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R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum,* HOR.

VOL. II.

CONTAINING THE CASES IN THE 42^D YEAR OF GEO. III.

1801—1802.

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JOHN COOKE, ORMOND QUAY, DUBLIN.

1815.

J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

LLOYD Lord KENYON, Lord Chief Justice.

SUCCEEDED BY

EDWARD Lord ELLENBOROUGH, Lord Chief Justice.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNIES-GENERAL.

Sir EDWARD LAW, Knt.
The Honourable SPENCER PERCEVAL.

SOLICITORS-GENERAL.

The Honourable SPENCER PERCEVAL.
THOMAS MANNERS SUTTON, Esq.

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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

1801.

In the Forty-second Year of the Reign of GEORGE III.

MAYLIN *against* TOWNSHEND.

Tuesday,
Nov. 10th.

MARRYAT moved to discharge the defendant out of custody on filing common bail, on the ground of a defect in the affidavit to hold to bail; wherein the plaintiff swore that the defendant was indebted to him *in the sum of 20l. and upwards*, for goods sold and delivered, and that no tender had been made of payment *of the said sum* in Bank-notes (a). And he referred to a case of *Barnet v. Wheeler*, Hil. 41 Geo. 3. where a similar motion had been allowed on the same and other objections: for *non con stat*, that there had not been a tender of all but the fractional part above the 20l. according to the case of *Jennings v. Mitchell* (b).

In an affidavit to hold to bail for 20l. and upwards, it is sufficient to negative a tender of the said sum in Bank-notes; that having reference to the specific sum sworn to, which was such as might be so tendered.

* But *the Court* said, that this differed from the case of *Jennings v. Mitchell*; for here the specific sum sworn to was such as might be tendered in Bank-notes; and a tender of that sum was expressly negatived, which was sufficient; and it had been so ruled in a case subsequent to that of *Jennings v. Mitchell*.

* [2]

(a) Pursuant to the provisions of the Bank Act, 37 Geo. 3. c. 45. s. 9.

(b) 1 East's Rep. 17.

1801.

Tuesday,
Nov. 10th.

PENNY *against* PORTER.

Upon breach of a contract for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot declare as upon an absolute contract for the delivery of 40 bags on the first day, &c. though 40 bags were then in fact delivered: but the contract must be stated in the alternative, according to the original terms of it.

* [3]

IN an action on the case for the non-delivery of wheat according to agreement, the first count of the declaration stated the contract to be, that in consideration that the plaintiff had agreed to purchase a large quantity, to wit, one hundred bags of wheat, each bag weighing 300lb. and for 40 bags, part of the same to pay to the defendant 1*l.* 16*s.* *per* bag, and for the remaining 60 bags to pay the market price at the then next market day; the defendant undertook to sell and deliver to the plaintiff 40 of the bags immediately, and the remaining 60 bags at the then next market day at the stipulated price. It then averred the sale and delivery of the first 40 bags in part performance of the contract, and set forth a breach as for the non-delivery of the remainder. The third count was similar in form, only stating the contract to be for the sale of 100 bags of wheat, 50 bags of which were to be sold and delivered immediately at the price mentioned, and the remaining 50 bags at the next market day, for the then market price. The contract was laid more generally in other counts. At the trial before *Le Blanc*, J. at the last assizes at *Bristol*, the contract proved was, that the defendant* was to let the plaintiff have 100 bags of wheat, *forty* or *fifty* bags to be delivered at the then present market for the stipulated price, and the remainder at the following market for the then market price. And further it was proved that the defendant immediately after delivered 40 of the bags, but did not deliver the remainder at the next market day. The question was, Whether the contract proved, being optional in the defendant to deliver 40 or 50 bags the first day, and the remainder the next market day, sustained the first count, stating the contract to be positively for the delivery of 40 bags on the first, and the remainder on the subsequent market day, inasmuch as the defendant had decided his option by the delivery in fact of the 40 bags in the first instance? The jury being of opinion that the defendant had an option to deliver 40 or 50 bags in the first instance, found a verdict for him under the learned Judge's directions: and leave was given to move to set the verdict aside, and enter a verdict

for

for the plaintiff for 3*l.* 12*s.* damages, if the Court should be of a different opinion.

This matter was once before agitated in this Court in *Hilary* Term last, when it underwent great discussion. It then came on upon a rule for setting aside a nonsuit in the first trial before Lord *Eldon*, at the preceding summer assizes, on the ground of the variance mentioned between the declaration and the evidence: and a new trial was granted on the ground of some uncertainty in the evidence, as to what the real contract was, which the Court thought should have been left to the jury to decide. But they then intimated a strong opinion, that if the contract were found to have been optional in the first instance, it could not be laid as an absolute contract for a certain number of bags, though in the event of the party's election of one of the alternatives (*a*).

Lens, Serjt. now moved to enter the verdict for the plaintiff, on the ground, that though the contract were optional in the defendant in the first instance, yet he having made his election to deliver 40 bags on the first day, thereby put an end to the option; and it might then be declared on as an absolute contract in effect to deliver those 40 bags on the first day, and the remaining 60 on the subsequent market day.

The Court however were of a different opinion, and held that the contract must be stated in the declaration according to the original terms of it, which made it optional in the defendant to deliver 40 or 50 bags in the first instance, and not an absolute contract for the delivery of either of those quantities.

Rule refused.

(*a*) On that occasion *Bond* and *Pell* argued in support of the rule for setting aside the nonsuit; and *Gibbs* and *Dampier* contra. The following cases were referred to in the course of their arguments. *Layton v. Pearce*, Dougl. 15. *Churchill v. Wilkins*, 1 Term Rep. 447. *Tate v. Wellings*, 3 Term Rep. 531. *White v. Wilson*, 2 Bos. & Pull. 116. and a case of *Shipman v. Saunders*, East T. 1783, where the contract in effect was to deliver goods within 14 days, or as soon as a certain vessel arrived: the vessel arrived after the 14 days; and on breach of the contract by non-delivery, the plaintiff declared in one count on a contract by the defendant to deliver within 14 days, and in another count to deliver on the arrival of the ship; but there being no count laying the contract in the alternative, the Court held the variance fatal.

1801.

PENNY
against
PORTER.

[4]

1801.

Wednesday,
Nov. 11th.

The KING against HIGGINS.

To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. And such offence is indictable at the Sessions, having a tendency to a breach of the peace.

THE defendant was indicted for a misdemeanor at the Quarter Sessions for the county of *Lancaster*, and was convicted on the second count of the indictment, charging, "That he on, &c. at, &c. did falsely, wickedly, and unlawfully solicit and incite one *James Dixon*, a servant of *J. Phillips*, &c. to take, embezzle, and steal a quantity of twist, of the value of three shillings, of the goods and chattels of his masters *J. P.*, &c. aforesaid, to the great damage of the said *J. P.*, &c. to the evil example, &c. and against the peace," &c. After judgment of the pillory and two years' imprisonment, a writ of error was brought, and the following causes assigned for error: 1. That the said count does not set forth any misdemeanor or offence which the justices of peace at their Quarter Sessions had jurisdiction to determine. 2. That it does not appear that *J. Dixon*, the principal, was ever convicted of the felony wherewith the defendant appears to be charged, as accessory before the fact. 3. The general error.

The case was twice argued; first, in *Trinity Term* last by *Scarlett* for the defendant, and *Cross* for the crown; and now by *Topping* for the defendant, and *Christian* for the crown.

For the defendant it was urged, 1st, That the count in question contained no charge of any matter indictable at common law. It is not every act, immoral in itself, or of evil example, which is indictable, although it may subject the party to find sureties of the peace. A bare solicitation or incitement of another to commit an offence is not indictable, unless it be accompanied by some overt act towards carrying the intent into execution; but if no such act be done either by the inciter or the party solicited, it is nothing more, as Mr. Justice *Foster* observes, than a mere fruitless ineffectual temptation. Now here it is not stated how or by what means the defendant solicited *Dixon* to commit the felony; nor that any act was done by the defendant, such as offering money or the like, to forward such solicitation; nor that any act by *Dixon* followed thereupon. It must therefore be presumed that nothing of this sort happened, as there can be no latitude of intendment in criminal cases to include

include any thing more than is charged (a). It stands therefore as a mere wish or desire of the defendant to do an evil act. If indeed any evil consequence ensue on such a solicitation, the party is answerable; but there is a locus penitentiæ between the solicitation and the act, and if he countermand the act before it be done, he is absolved from the consequences. An argument may be derived from analogy to cases of slander; for if no action would lie for imputing such a bare solicitation to another, it follows that the solicitation itself cannot be indictable. In *Bray v. Andrews* (b) the words were, "My master was not content to take my living from me, but sent his man *Andrews* to kill me." Two of the judges thought the action lay, though no effect followed upon the command: but the other two held otherwise: because no action lies for slander except on the imputation of such things as are punishable by law; and it was never seen that any punishment was appointed either by the common or statute law, if no effect ensued thereupon. So in 1 *Roll. Abr.* 50. Q. *pl.* 2. If a man say of another, "that he lay in wait to rob him," an action lies; for there is the imputation of an evil act done. But in the same book, *pl.* 4. where the words were, "that he keepeth men to rob me," it is said no action lies; because the only impute a bare intention without any act. The same principle is clearly laid down in *Murrey's* case (c), and in *Crofts v. Brown* (d), and in *Eaton v. Allen* (e). *Bracton*, lib. 3. fo. 128. *pl.* 13. observes, "ubi factum, ibi poterit esse forcia quandoque, sed nunquam forcia sine facto;" (which word forcia, says Lord *Coke* (f), is a word of art, signifying the furnishing a weapon of force to do the fact, by force whereof it is committed, the party furnishing the weapon not being present at the fact:) "quia ubi principale non consistit, nec ea quæ sequuntur locum habere debent: sicut dici poterit de præcepto, conspiratione, et consimilibus, quamvis hujusmodi esse possunt etiam sine facto; et quandoque puniuntur si factum subsequatur, sed sine facto non, &c. nec etiam obesse, debent præceptum, &c. nisi factum subsequatur." *Vaughan* (g) was indicted for persuading an apprentice to withdraw himself from his master, so that he should not be taken upon a warrant; and *Houghton*, J. excepted to the indictment

1801.

The KING
against
HIGGINS.

[7]

(a) *R. v. Wheatley*, 2 *Burr.* 1127. (h) *Moore*, 63. (c) 2 *Bulstr.* 206.
(d) 3 *Bulstr.* 167. Sed vi. *Dean v. Eaton*, 1 *Bulstr.* 201. (e) 4 *Co.* 16. b.
(f) 2 *Inst.* 132. (g) *Poph.* 154.

because

1801.
The KING
against
HIGGINS.

[8]

because no venue appeared, nor that the apprentice did hide himself from the warrant; *for if he did not so, the persuasion was nothing.* In *R. v. Daniel (a)* the indictment charged that he inticed away an apprentice from his master, and seduced him to take and carry away certain goods of his master from his house, and that the defendant knowingly received the same. It was objected, that this was but a private and not a public injury; that case only lies, and not trespass for inticing away a man's servant; that no fact was laid to be done in pursuance of such inticing, except as to the latter part of the charge respecting the carrying away the goods, as to which that no venue was laid where the goods were taken away: for which reasons the judgment was arrested. The same case is reported in 3 *Salk.* 191. (*b*), where the indictment is said to have been holden naught by all the Court for not averring that the apprentice did absent himself: for though the words *absentare causavit* imply that he did absent himself; yet the indictment must not only shew the cause but the effect which followed. The same case is most fully reported in 6 *Mod.* 99. where Lord *Holt* says, that advising one to rob or kill, *without something be done thereupon*, is not indictable. And he agreed, that a conspiracy to charge one with a bastard child is indictable; but if one should advise another to do it without more, it would not. And this report also agrees, that the indictment was holden ill by the whole Court for want of an express allegation that the servant did absent himself. And herewith agrees the opinion of *Powell, J.* in 6 *Mod.* 182. S. C. Lord *Holt* indeed afterwards said (*c*), that he was not satisfied, that to seduce one's servant away was indictable; but to persuade him to embezzle his master's goods was: but whether it were necessary to allege that the servant had embezzled them? for the indictment might perhaps be for the evil act of persuading. This latter opinion however was expressed with doubt: and it appears that Lord *Holt* did not adhere to it in the subsequent case of *Reg. v. Catlingwood (d)*. That also was an indictment for inticing an apprentice to take goods from his master, and afterwards receive-

[9]

(a) 1 *Salk.* 380.

(b) Lord *Kenyon* observed, that the authority of the third part of *Salkeld* was not to be relied on, unless corroborated by other books; and it has been often denied by Mr. Justice *Foster*.

(c) 6 *Mod.* 101.

(d) 2 *Ld. Raym.* 1116.

ing the goods knowing them to be the master's, and converting them to his own use. Judgment was given for the defendant on the authority of *Reg. v. Daniel*. And to an exception taken to the indictment that it did not aver that the apprentice took away the goods, and that it was not enough to say that the defendant received them; Lord Holt said, that it should have been laid that the defendant seduced the apprentice, and that the apprentice vi et armis took away the goods. Though he also thought that the indictment might have been general against the defendant for taking away the goods: for he was a taker. In another report (a) of the same case it is stated, that all the Court were of opinion *that it was not enough to lay an inticement without an act done in pursuance of it*. And another report (b) is to the same effect. In none of the books is there any case or precedent to be found of an indictment for a bare solicitation to commit an offence without an act done in pursuance of it: and the silence of all the writers on the crown law on this subject is of itself a strong argument that no such offence is known to the law. The general principle of our penal code is to punish the act, and not the intent; with the single exception of high treason, where the traitorous intent constitutes the crime: but even there it must be manifested by some overt act. Nothing is here stated which necessarily imports that any act was done towards the commission of the offence solicited: a man may incite by words as well as acts. 2dly, It is uncertain upon the face of the indictment whether the felony solicited were afterwards committed or not; the word *incite* is in that respect ambiguous: but as the soliciting a felony can only be a misdemeanor in case the felony be not committed, it ought to be expressly averred that no felony was committed; though it may not be necessary to prove such a negative. But 3dly, supposing the offence charged to be a misdemeanor, and that it is well laid in point of form; yet the Quarter Sessions had no jurisdiction to try it, inasmuch as it is no breach of the peace. That Court being composed of judges deriving their authority from statute (c), can only derive jurisdiction from the same source. The stat. 1 Ed. 3. st. 2. c. 16. assigned justices *to keep the peace*. The stat. 4 Ed. 3. c. 2. which made the same provision, also assigned other justices to deliver

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(a) 6 Mod. 283. (b) 3 Salk. 42. (c) Vide 2 Hawk. ch. 8, s. 13. et sequent.
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the gaols of such whose indictments were taken before justices of the peace. The stat. 18 *Ed. 3. st. 2. c. 2.* for the first time gave them jurisdiction to try *trespasses* in general as well as felonies. This is confirmed by stat 34. *Ed. 3. c. 1.* The commission of the peace (a) in a sweeping clause gives them authority to inquire of all trespasses, &c. and of all *other offences of which justices of the peace may lawfully inquire*; and particularizes a number of offences, not including the offence in question. In the construction of this clause Lord Coke says, that the latter words, “of which justices,” &c. qualify the generality of the former: and *Hawkins* (b) defines *trespasses* in a large sense to mean not only all inferior offences which are properly and directly against the peace, as assaults and batteries, and such like; but also all others which are only so by construction. It is true he goes on to add, “as all breaches of the law in general are said to be (c);” yet he immediately states forgery and perjury as exceptions (d); which he founds upon this consideration, that the word *trespass* is to be taken in its proper and natural sense, namely, to mean personal wrongs and open violence, or at most to extend to such other offences only as have a direct and immediate tendency thereto, as libels and such like. Now it cannot be said that a bare inciting of one to do an illegal act, which implies that it is done in a secret manner and without force, is either a direct breach of the peace, or has a direct and immediate tendency thereto.

On the part of the crown it was contended, that every attempt to commit a crime, whether felony or misdemeanor, is itself a misdemeanor and indictable, a fortiori in the former case. And if an act be necessary, the incitement or solicitation is an act: it is an attempt to procure the commission of a felony by the agency of another person. By the incitement the party does all that is left for him to do to constitute the misdemeanor; for if the felony be actually committed, he is guilty of felony as accessory before the fact. In high treason, though the rule still holds that *voluntas reputatur pro facto*, and therefore the compassing the king's death is

(a) Vide 2 *Hawk. ch. 8. s. 23. et sequent.* (b) *Ib. s. 38.*

(c) In *R. v. Lane*, an indictment for exercising the trade of a barber without serving to it seven years was quashed, because it was not laid *contra pacem*; for every breach of the law is against the peace. 6 *Mod.* 128.

(d) Vide *R. v. Farrington*, 1 *Salk.* 406. and *R. v. Gibbs*, 1 *East R.* 175.

the substantive treason; yet this must be proved by some overt act or *apertum factum* (*a*). And both Lord *Coke* (*b*) and Mr. Justice *Foster* (*c*) agree, that any advice, persuasion, or command, to incite or encourage others to commit the fact, is an overt act of treason. If he who procures a felony to be committed by another be himself a felon (*d*), it follows that he who attempts to procure it attempts to commit a felony. The gist of the offence then is the attempt or endeavour; the manner of doing it is matter of evidence, and need not be laid in the indictment. In *R. v. Fuller* (*e*), the charge of endeavouring to incite a soldier to mutiny, &c. was holden to be well laid in an indictment on the st. 37 Geo. 3. c. 70. without stating the means employed. And in *Johnson's* case (*f*), the endeavour to commit an offence was said to be as criminal as the offence itself. The argument from analogy to cases of slander is in favour of the prosecution; for the principle is, that no action lies for the imputation of any thing, which, if done by the party, would not have subjected him to punishment. Now in *Leverage v. Smith* (*g*), all the Court held, that an action well lay for these words: "*John Leverage* would have robbed the house of *J. S.* if *J. D.* would have consented unto it: he persuaded *J. D.* unto it, and told him he would bring him where he should have money enough." Although the words themselves import no act done, but only an evil intent, as was objected in that case. So in *Passie v. Mondford* (*h*), the words were, that the plaintiff "sent a letter to the defendant's master, and therein willed him to poison his wife," which were objected not to be actionable because no act was done; but the Court resolved otherwise, because it was a great slander *to will one to do such an act*; and this judgment was approved in *Deane v. Eton* (*i*), although, as was there said, no act were done. Again, in *Froude v. Froude* (*k*), the words were "*F.* went to *D.*'s house, and would have had him rob *B.*'s house, and he (inuendo, the plaintiff) did rob him." It was objected that it was uncertain by the words who robbed him. But the Court held that the first words were of themselves actionable, and made worse by the second, whether the robbery were im-

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(a) 3 Inst. 5, in margine.

(e) 1 Bos. & Pull. 180.

(h) Ib. 747.

(b) Ib. 6.

(f) 2 Show. 1.

(i) 1 Bulstr. 201.

(c) Fost. 195.

(d) Fost. 125.

(g) Cro. Eliz. 710.

(k) 2 Lev. 205.

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puted to be done by the plaintiff or by his procurement. The cases of *The Queen v. Daniel* (a) and *The Queen v. Callingwood* (b) did not decide that it was necessary an act should be done to sustain an indictment, or that the persuading another was not an act. The true points on which the former case turned are stated in the latter case (c) to have been, 1. The seducing an apprentice from his master; which was the only point in judgment, and was holden not to be an indictable offence, but a mere private injury. 2. The persuading him to take away his master's goods; as to which no venue was laid. *Callingwood's* case also went off on the latter ground: and besides, the indictment there did not lay a persuasion to steal, but only to take and carry away his master's goods, which might be only a civil injury. In *R. v. Best* and others (d), which was an indictment for a conspiracy to charge a man as the father of a bastard, it was objected that without an act done it was no crime, and that the indictment alleged nothing but that the defendants conspired to tell the prosecutor that he was the father of the child of which *E.* was enseint. But judgment was given for the crown. The same kind of objection was urged in *Rex v. Kimmsly and Moor* (e), where it was urged that bare words, charging another with endeavouring to commit sodomy, were not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution. But the objection was unanimously over-ruled: and several instances were mentioned of attempts to commit felonies being punished as misdemeanors. In *R. v. Sutton* (f), the having tools for coining in possession, with intent only to use them, was holden indictable. So in *The King v. Plympton* (g), the promising money to a member of a corporation to induce him to vote for the election of a mayor; though the objection would equally have holden there that nothing but words passed which were no act. The same principle governed the case of *R. v. Vaughan* (h), where an information was granted against the defendant for attempting to bribe a privy counsellor to procure him an office in the colonies; and the like was lately exhibited against *Young*, for attempting to influence a

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(a) 1 *Salk.* 580. 6 *Mod.* 100.

(d) 2 *Ld. Raym.* 1167.

(g) 2 *Ld. Raym.* 1577.

(b) 2 *Ld. Raym.* 1116.

(e) 1 *Str.* 193.

(h) 4 *Burr.* 2494.

(c) 6 *Mod.* 289.

(f) 2 *Str.* 1074.

juryman in giving his verdict. But if there were any doubt on principle, and on former authorities, the case of *Rex v. Scofield* (a) is directly in point. It was there holden, that the attempting to set fire to a man's own house, which is only a misdemeanor, was itself a misdemeanor per se, as much as an attempt to commit a felony, though differing in degree. There indeed was an act done: but another case was there cited before *Adams, B.* at *Shrewsbury*, which cannot be distinguished from the present; where an indictment charged a defendant with an attempt to suborn one to commit perjury; which upon reference to the judges was unanimously holden to be a misdemeanor. 2ndly, It was not necessary to negative in the indictment, that the felony solicited was committed; for no felony can be presumed if it be not specifically charged. In *R. v. Bacon* (b), which was an indictment for inciting to the death of another by offering a reward for that purpose, the murder itself was not negatived. Nor in any of the cases for soliciting felony is any similar averment introduced. It was however open to the defendant to have defended himself by proof of the felony committed. 3dly, The Quarter Sessions have jurisdiction by the words of their commission over all *trespasses*; and this is explained by *Hawkins* (c), to include not only all inferior offences properly and directly against the peace, but also all such as are only so by construction, as all breaches of the law in general are said to be; with the exceptions only of perjury and forgery; which exceptions rest more upon authority than principle. And at least the solicitation of a felony has as much a tendency to a breach of the peace as a cheat, over which it is acknowledged the Sessions have jurisdiction.

In reply to the cases cited on the part of the crown, it was observed that in *Fuller's* case (d) the indictment was framed on the wording of the stat. 37 *Geo. 3. c. 70.* which made the endeavouring to incite a soldier to mutiny a substantive offence. And in *Leverage v. Smith* (e), the words imply an endeavour by some act of the party himself to commit the felony imputed. In *Passie v. Moudjford* (f), the sending the letter was an act imputed: so in *Deane v. Eton* (g), the placing the woman in

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(a) *Cald.* 397.(b) 1 *Sid.* 230. 1 *Lev.* 146. 1 *Keb.* 809.(c) 2 *Hawk. ch.* 8. s. 53.(d) 1 *Bos. & Pull.* 180.(e) *Cro. Eliz.* 710.(f) *Ib.* 747.(g) 1 *Bulstr.* 201.

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the house with the intent alleged: and in *Froude v. Froude* (a), the words spoken contained an actual charge of felony committed. The cases of *R. v. Best* (b) and *R. v. Kinnersly and Moor* (c), being cases of conspiracy, are clearly distinguishable from the present. *R. v. Vaughan* (d), *R. v. Plympton* (e), and *R. v. Young*, were cases of bribery, which is a specific offence, in which it is immaterial whether the bribe were given or only offered. Lastly, in *Scofield's* case (f), which has been most relied on, there was a direct act done by him, namely, an attempt to set fire to his own house, and not a bare solicitation of another to do it. Still further, in *Sutton's* case (g), there was an actual attempt to commit high treason, by having tools for coining in his possession for that purpose. And in *Johnson's* case (h), besides that the report is not very intelligible, several acts are mentioned to have been laid in the information, such as, the giving money, and the putting it in a chest, to be paid upon the event of the verdict; but above all, the offence charged, which was in effect the tampering with a witness before a trial, to give evidence for a corrupt consideration, was in itself a specific offence against public justice.

[17] Lord KENYON, C. J. The offence imputed to this defendant is of the most serious kind, no less than, that for his own wicked gains he solicited and incited a servant to rob his master; and can it be a question in a country professing to have laws subservient to justice and morality, Whether this be an offence? So it is, however, that a great number of cases have been cited, some of which, I confess, have tended, not to enlighten, but to perplex my mind. But it is matter of satisfaction, that the more modern cases have gotten rid of a great deal of jargon on the subject. I dismiss at once from my consideration all the cases of actions for slander. And I am satisfied that some of the propositions which are stated in the books referred to could not have come from the judges to whom they are imputed. As for example, when Lord Holt is stated (i) to have said, that if one should advise another to charge a person with a bastard, (by which it must be understood that the charge was ill founded,) it would not be indictable. I do not believe that he said so;

(a) 2 Lev. 205.

(b) 2 Ld. Raym. 1167.

(c) 1 Stra. 165.

(d) 4 Burr. 2494.

(e) 2 Ld. Raym. 1377.

(f) Cald. 397.

(g) 2 Stra. 1074.

(h) 2 Show. 1.

(i) Vi. Regina v. Daniel, 6 Mod. 100.

for it must be remembered, that such a charge is made upon oath, and he could never have said that to suborn a witness to commit perjury was no offence, although the perjury were not alleged to have been committed. But if he had delivered such an opinion, it is a sufficient answer, that the contrary has been expressly adjudged in more modern times by all the judges in the case alluded to, before Mr. Baron *Adams* at *Shrewsbury*, which was quoted in the case of *The King v. Scofield*: and God forbid that it should not be considered as an offence. But it is argued, that a mere intent to commit evil is not indictable, without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act; and the answer given at the bar is decisive, that it would be sufficient to constitute an overt act of high treason. The case of *The King v. Vaughan* was not passed over slightly. It was there attempted to be maintained, that an attempt to bribe the Duke of *Grafton*, then a cabinet minister, and a member of the privy council, to give the defendant a place in *Jamaica*, was not indictable. Lord *Mansfield* rejected the attempt with indignation. It was a solicitation to the duke to commit a great offence against his duty to the king and the public. So it is here: and it would be a slander upon the law to suppose that an offence of such magnitude is not indictable. I am also clearly of opinion, that it is indictable at the Quarter Sessions, as falling in with that class of offences, which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. To this general rule there are, indeed, two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law. No other exceptions, however, have been allowed, and therefore this falls within the general rule.

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GROSE, J. This is a very grievous offence, and it is most important to the public to be made known as such. Nevertheless, if it be no offence to incite a servant to steal from his master, or if the offence be not properly laid in point of form, or if the Sessions have no jurisdiction to inquire of it, then the judgment must be arrested. First, as to the offence itself, it must be admitted that an attempt to commit a felony is in many cases at least a misdemeanor; to instance the common cases of an attempt

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attempt to rob or to ravish, which are indictable offences in every day's practice. But further, an attempt to commit even a misdemeanor has been shewn in some cases to be itself a misdemeanor. Then if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a robbery were actually committed, the inciter would be a felon. The incitement, however, is the offence, though differing in its consequences, according as the offence solicited (if it be felony) is committed or not. The guilt of an accessary before is in many cases as great as that of the principal; sometimes indeed it is even deserving of greater punishment. For the principal is often put upon committing the offence by the accessary before, and is instructed by him how to perpetrate it, in order that he may be benefitted by becoming the receiver of the goods after they are stolen. It is said, however, that there is no instance of a mere solicitation to another to commit a felony being adjudged a misdemeanor; and it was attempted to be distinguished from the case of *Rex v. Scofield*: but that case, though not immediately in point, is in truth much stronger than the present; for there an attempt to commit a misdemeanor was holden indictable: and the cases of *R. v. Faughan* and *R. v. Plympton* were expressly recognized, which come still nearer to the present: nor was the case of *R. v. Johnson* denied to be law, which was a solicitation to commit perjury, and which had been cited in the course of the argument. All these cases prove, that inciting another to commit a misdemeanor is itself a misdemeanor: a fortiori therefore it must be such to incite another to commit felony. It is also objected, that some act should be laid to have been done in pursuance of the incitement; but I do not remember any case where such an averment has been holden to be necessary; nor can it be deemed so if, as I conceive, the gist of the offence is the incitement: and indeed if the incitement were to commit felony, and the fact were committed, the inciter would himself be a felon. Neither was it necessary, in order to shew that this was only a misdemeanor, to negative the commission of the felony. None of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment. But it is left to the defendant to shew if he please that the misdemeanor was merged in the greater offence. Then as to the question of jurisdiction, I am clearly of opinion that there is no foundation for the objection. The

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passage

passage cited from *Hawkins* appears to me to be good law, and it goes the whole length of shewing that the Sessions have jurisdiction in this case. The offence tends to a breach of peace: and no good reason can be assigned why that Court should not have jurisdiction over such offences. As to the reasoning drawn by analogy from actions for slander, it is in support of this indictment; and I should think such an action would lie for accusing a man of doing what this defendant is here charged to have done.

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LAWRENCE, J. Three objections were taken to this indictment: 1st, That it is uncertain on the face of it whether *Dixon* did not steal the goods; and that if he did, then the offence would be felony and not a misdemeanor. 2ndly, That a mere intent to commit a crime is not indictable. 3rdly, That the justices in Sessions had no jurisdiction. As to the first, there is no pretence for it; for it cannot be intended that a felony was committed where none is so charged. In 2 *Hawk. ch. 25. s. 60.* it is laid down, that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever. And an instance is given from *Keilw. 87.* wherein it was adjudged that an indictment against one for feloniously breaking such a prison, and commanding another who was therein imprisoned for felony to escape, was not a good indictment for a felonious breaking, without expressly shewing that the party did escape; and yet the breaking could not be felonious as it was laid, unless there was an escape. Therefore as there is no averment here that *Dixon* did steal the goods, it must be taken that he did not. 2ndly, All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is, whether, an attempt to incite another to steal is not prejudicial to the community? of which there can be no doubt. The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act. The offence does not rest in mere intention; for in soliciting *Dixon* to commit the felony, the defendant did an act towards carrying his intent into execution. It is an endeavour or attempt to commit a crime. The argument therefore for the defendant must go the length of shewing that an endeavour or attempt to commit a felony is no offence, not even a misdemeanor;

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meanor, if the felony be not committed: for if the felony had been committed by the servant, the defendant himself would have been a felon. The doctrine laid down by Lord *Mansfield* in *R. v. Scofield*, which comprises all the principles of the former decisions, entirely governs the present case; that so long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. That case is ably reported, and contains every thing convincing which can be said on the subject. There are however older authorities to the same purpose. *R. v. Lady Lawly, Fitzg.* 263. was an indictment charging that the defendant, knowing that *J. C.* was indicted for forgery, *endeavoured* to keep away a material witness for the king: on which there was judgment for the crown. The case alluded to in *R. v. Scofield*, as tried before Mr. Baron *Adams* at *Shrewsbury*, is in point; and I have precedents of similar indictments, one of *The King v. Broom*, in *Northumberland*, drawn by Mr. Justice *Yates*, when at the bar. Another against *Guy* and another, drawn by Mr. Justice *Ashurst*, for soliciting one to kill the Chevalier *D'Eon* (a). 3rdly, The objection to the want of jurisdiction is founded on a mistaken supposition that the Quarter Sessions can only take cognizance of offences which are direct breaches of the peace; for their jurisdiction also extends to such offences as *tend* to a breach of the peace. 2 *Hawk. ch. 8. s. 38.* is in point; and this is confirmed by the judgment of the Court in *Rex v. Rispat*, 3 *Burr.* 1320. which was a conspiracy to charge a man with taking hair out of a bag; and it was holden that the offence was cognizable by the Sessions; a conspiracy being a trespass, and tending to a breach of the peace.

LE BLANC, J. It is contended that the offence charged in the second count, of which the defendant has been convicted,

(a) That was an indictment against two for soliciting and endeavouring to persuade and procure one *O. M'Allerton* to kill and murder the Chevalier *D'Enon*. A 2d count charged them with conspiring to take and seize him, and carry him against his will to parts beyond the seas. The 3d count was for a like conspiracy, and also charged that the defendants lay in wait for that purpose.

is no misdemeanor, because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done; namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to. The cases of *R. v. Daniel*, and *R. v. Callingwood*, cited for the defendant, do not support the proposition that a mere solicitation is not indictable: on the contrary, Lord *Holt* says in the former case (a) that perhaps an indictment might be *for the evil act of persuading* another to steal. That part of the case however was determined upon the want of a venue. And in *R. v. Callingwood* (b), the only point determined was, that the first part of the charge, which was for enticing an apprentice to take and carry away goods from his master, was not indictable, being only a private injury for which an action on the case would lie, but not of such a public nature as to maintain an indictment: and that the second part of the charge was not well laid for want of a venue. Then as to the objection that the Quarter Sessions had no jurisdiction in this case, it is sufficient to answer, that the general words of the commission of the peace comprehend all trespasses; and the word *trespasses* not only includes direct breaches of the peace, but also all such offences as have a tendency thereto: and on that ground conspiracies have been holden to be cognizable by the Sessions; not as actual breaches of the peace, but as tending thereto. And it appears to me that this is an offence tending to a breach of the peace, and is therefore indictable before that jurisdiction.

Judgment affirmed.

(a) 6 *Mod.* 101.

(b) 2 *Ld. Raym.* 1116.

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Thursday,
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Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail to negative a tender of the debt in Bank-notes to the best of his knowledge and belief; but such tender must be positively negatived.

THE affidavit to hold to bail in this case was made by one J. C., stating himself to be agent to the plaintiff, and swearing positively to a debt of 20*l.* for goods sold and delivered, and that no offer had been made to pay that sum or any part thereof in Bank-notes, *to the best of the deponent's knowledge and belief.*

Const obtained a rule nisi for discharging the defendant on common bail, for the defect of the affidavit in not positively negating a tender of the debt in Bank-notes, as the act (*a*) requires; the plaintiff living in *England*, and therefore the case not falling within the exception where the principal with whom the debt was contracted is abroad.

Lamb now shewed cause, and admitted that the objection would have been well founded according to the case of *Cass v. Levy* (*b*); but said, that in a subsequent case of *The Mayor of London v. Dias* (*c*), an affidavit sworn in the present manner by a clerk in the chamberlain of *London's* office was holden to be sufficient, though the chamberlain himself, who was the principal officer in that respect, was in *England*. But

The Court said, that was the case of a corporation, and an exception to the general rule, which in the case of individuals requires a positive negative of a tender of the debt in Bank-notes where the principal resides here (*d*).

Rule absolute.

(*a*) 37 *Geo. 3. c.* 45. (*b*) 6 *Term Rep.* 520. (*c*) 1 *East's Rep.* 237.

(*d*) But a direct negative of such tender sworn by the agent himself is sufficient. *Knight v. Keyte*, 1 *East's Rep.* 415.

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The KING *against* The Inhabitants of COPPULL.Thursday,
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TWO justices by an order removed *Henry Bentham*, his wife, and three children by name, from the township of *Standish with Langtree* to the township of *Coppull*, both in the county of *Lancaster*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case, stating, That the respondents proved by the evidence of the pauper, that his father many years ago purchased a small estate for less than 30*l.* in the township of *Coppull*, and occupied it himself for about five years, during which time the pauper was part of his father's family; and that the pauper's father during his occupation of the estate actually paid the parish rates or assessments in respect of his estate; but the respondents did not produce any rates or assessments, and had not given any notice for the production of the assessments or rates. The appellants objected, that without the production of them, or having given notice to produce them, there was no legal or proper evidence that the pauper's father was charged for the same.

A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate.

Topping and *Scarlett*, in support of the order of Sessions, said, that the production of the rate was only necessary where it stood uncertain or indifferent who is rated for the estate, whether the owner or occupier: but here it was unnecessary to be produced, because as the pauper's father was both owner and occupier, no other person could be rated; and it was enough to shew that he had in fact paid the rate; and they referred to *R. v. St. Issey (a)*, where the like objection was taken to a settlement gained by being rated and paying to the land-tax, because the rate itself was not produced nor any notice given to produce it: but the Court there over-ruled the objection, and treated it as a clear case.

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Cross was to have argued *contra*.

Lord KENYON, C. J. It is impossible to argue that parol evidence may be given of rates which are not produced, nor any notice proved to produce them, nor any reasonable account given for their non-production. The best evidence was not given which the nature of the thing would admit of.

GROSE, J. It is in every day's experience to reject parol evidence of a writing which may and ought to be produced.

Per Curiam,

Both Orders quashed.

(a) *Burr*, S. C. 926.

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Nov. 12th.

The KING against The Inhabitants of CHADDERTON.

Where a case from the Sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there, since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. Hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information respecting her own settlement were dead.

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TWO justices by an order removed *John Buckley*, his wife and five children by name, from the township of *Little Bolton* to the township of *Chadderton*, both in the county of *Lancaster*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The respondents proved that the pauper, *John Buckley*, when he buried his first wife, applied to and received relief from the overseers of *Chadderton*; and that the pauper's mother, being with child of a bastard some few years after his father's death, went from another township to *Chadderton* to lie in there, and "as the pauper had heard from his mother," who has been dead some years, she was relieved there by *Chadderton*. This hearsay evidence was objected to by the counsel for *Chadderton*; but it was received: and the removants did not give any other evidence of a settlement in *Chadderton*. The Sessions conceiving the above sufficient evidence of a settlement in *Chadderton*, directed the appellants to go into their case; and the appellants proved that when the pauper was about 12 years of age, his mother and stepfather made a verbal agreement with *James Platt*, of *Great Bolton*, cotton weaver, that the pauper, who was then able to weave a little, should weave for him three years. The stepfather and mother were to have half the earnings of his weaving, and *Platt* the other half. *Platt* was to learn him to weave and find him looms, but the stepfather and mother were to find him in every thing else. He served out the three years with *Platt*, during which time he slept in *Great Bolton*. The *Sundays* he passed with his mother, and the rest of his time at *Platt's*; but this was not mentioned in the agreement.

When this case was called on in the paper for argument,

Lord KENYON, C. J. said, that whatever doubt might be raised as to the settlement in *Great Bolton*, concerning which he thought the Sessions should have found the fact one way or the other, whether the pauper contracted to serve as an apprentice, or only as a hired servant, in the former of which cases no settlement could be gained, as the binding was not by deed, which

Lord

Lord *Holt* says (*a*) is necessary in the case of an apprentice; yet at any rate the orders could not be supported, there being no evidence of any settlement in *Chadderton*, to which the removal was made; the bare fact of the pauper's having been relieved there being no proof of it, as they might have been relieved as casual poor.

Holroyd and *Cross*, in support of the orders, observed, that the fact of the pauper's having received relief from the overseers of *Chadderton* was at least *primâ facie* evidence of their being there settled, so as to call upon them to account for it by shewing that such relief was given to the paupers as casual poor, or under a misapprehension of their being settled there; nothing of which was stated in the case: and therefore the fact must be taken as equivalent to an acknowledgment by *Chadderton* that the paupers were their parishioners at the time.

Lord KENYON, C. J. The hearsay from the pauper's mother is no evidence at all of any fact (*b*); and then the only fact applicable to the settlement in *Chadderton* is, that when the pauper buried his first wife he received relief there from the overseers: but the bare fact of his receiving such relief is no evidence of a settlement, for the reason I before gave. If the paupers were in want of relief while they were in *Chadderton*, the overseers were bound to give it, whether the paupers were settled there or elsewhere. And by the late Act of Parliament (*c*) they could not have been removed till they were actually chargeable.

The respondents' counsel then desired that the case might be sent back to the Sessions to be reheard, as there was other evidence of the settlement in *Chadderton*; and the subsequent settlement was what was understood to be principally contested.

Topping contra said, that both the settlements were contested; and the respondents ought to have come prepared with all their evidence on the trial of the appeal. But

Lord KENYON, C. J. said, that as the respondents might have given other evidence of the settlement in *Chadderton*, if the Sessions had not been satisfied with this, there seemed no impropriety in sending the case back to be reheard; and he would recommend to the magistrates to determine the fact in

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(*a*) *R. v. Callingwood*, 2 *Ld. Raym.* 1117.

(*b*) *Vide post. R. v. Ferry-*

frystone, and *R. v. Abergevilly*.

(*c*) 35 *Geo. 3. c.* 101.

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what character the pauper contracted to serve his master, which would decide the principal question one way or other, and make it unnecessary to send the case back again for the opinion of this Court.

Per Curiam,

The Case remitted to the Sessions.

Thursday,
Nor. 12th.

The KING against AIREY.

In an indictment on the stat. 30 G. 2. c. 24. for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so, by means of which *said* false pretences he obtained the money; afterwards negating such pretences to be true; tho' it be not in terms alleged that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false.

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THE first count of the indictment stated, that one *James Barrow*, on the 22d of *March*, 40 Geo. 3. &c. at the burgh of *Kirkby in Kendal*, in the county of *Westmoreland*, delivered to the defendant *Airey*, late of the burgh, &c. common carrier, certain goods and chattels of the said *J. B.*, to be safely carried by the defendant from the said burgh to one *John Leach* at *Lancaster*, &c. and there to be delivered, &c. for a reasonable hire and reward, &c. and that the defendant afterwards, to wit, on, &c. at, &c. received the said goods under pretence of carrying and delivering, and then and there undertook to carry and deliver the same accordingly. And that the defendant contriving and intending to cheat the said *J. B.* of his money, afterwards, to wit, on the 15th of *April* in the year aforesaid, with force and arms, at, &c. unlawfully, knowingly, and designedly, pretended to the said *J. B.* that he the defendant had carried the said goods from the burgh to *Lancaster*, for the purpose of delivering the same to the said *J. L.*, and had there (at *Lancaster*) delivered the same to the said *J. L.*, and that the said *J. L.* had given him the defendant a certain receipt, expressing such delivery of the same goods to the said *J. L.*, but that he the defendant had lost or mislaid the same receipt, or had left it at home; and that the defendant thereupon demanded of the * said *J. B.* 16s. for the carriage of the said goods on that occasion; by means of which *said false pretences*, he the defendant did then and there, to wit, on, &c. with force and arms, at, &c. unlawfully, knowingly, and designedly, obtain from the said *J. B.* 16s., with intent to cheat the said *J. B.* of the same. Whereas in truth and in fact the defendant did not at any time whatsoever carry the said goods, or any part thereof, from the burgh aforesaid to *Lancaster* aforesaid, for the purpose of delivering the same to the said *J. L.*; and whereas in truth and fact the defendant did not at any time before the time of his said pretences, and obtaining the said money

money as aforesaid, deliver the said goods, or any part thereof, to *J. L.* at *Lancaster*, or at any other place whatsoever; and whereas in truth and in fact, the said *J. L.* never did deliver the said supposed receipt, or any receipt whatever, expressing the said supposed delivery of the said goods to the said *J. L.*; and whereas in truth and in fact the defendant never received from *J. L.* any receipt whatsoever, concerning the said supposed delivery of the said goods, or any part thereof; and whereas in truth and in fact the defendant never had in his custody or possession any receipt or memorandum whatsoever, relating to the said supposed delivery, &c. There was another count, not materially different as to the present purpose,

After conviction and judgment of transportation for seven years, the defendant brought a writ of error, and assigned for special cause, 1. That it is no where alleged in the indictment, that he did *falsely* pretend any matter or thing to the said *J. B.*, by means of which the said sum of 16s. mentioned to have been unlawfully, knowingly, and designedly obtained by the defendant from *J. B.*, with intent to cheat and defraud him, was so obtained by the defendant. 2. That no false pretence whatever, specifically and positively alleged and charged as such, is alleged and charged in the indictment to have been made or used by the defendant to *J. B.*, by means of which the said sum of 16s. alleged to have been wilfully, knowingly, and designedly obtained by the defendant from *J. B.*, with intent to cheat and defraud him thereof was so obtained. And also assigned the common error.

Knowlys took objection to the indictment, first, that it is not expressly alleged that the pretences made by the defendant were *false*, which is the gist of the offence created by the stat. 30 Geo. 2. c. 24. on which alone the indictment can be sustained. The words of the statute are, that "all persons who knowingly and designedly *by false* pretences, &c. shall obtain goods, &c. with intent to cheat any person, &c. shall be deemed offenders." 2 Hawk. ch. 25. s. 60. (which cites *Staudf.* 96, and *Keilw.* 86, 7.) says that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever. And the same author (s. 110.) adds, that neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make

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make good an indictment which does not bring the fact prohibited within all the material words of the statute; as rapuit in rape; voluntariè and corruptè in perjury. Secondly, The omission in charging that the pretences were false cannot be supplied by the words following; “by means of which said *false* pretences,” &c. for no pretences used were before alleged to be false, and therefore the conclusion is not warranted by the premises. It is true, at the end of the indictment the truth of the pretences used is negatived; but that will not supply the want of a direct allegation that the defendant knowingly used *false* pretences; because it is not enough to bring a case within the statute, that the defendant made use of certain pretences, and that those pretences were false, unless he knew them to be false at the time. Falsity is as much the substance of this crime as of perjury; now no indictment for perjury would be good without a direct allegation that the defendant *falsely* swore, although the falsehood of the fact sworn were afterwards positively alleged. So in forgery, all the precedents are that the instrument was *falsely* made. Besides though the truth of each member of the pretence is separately negatived, it is no where stated that the whole combined together was false.

Holroyd contrà was stopped by the Court.

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Lord KENYON, C. J. The case is too clear to require any argument. I do not quarrel with any of the general propositions which have been advanced, such as, that the substance of the offence ought to be charged with certainty; and that the law will not intend guilt unless it be positively alleged and proved; and the like. But the question is, Whether there be not a positive charge of obtaining money upon false pretences in this case? In certain cases it is true, there must be known technical words used in order to describe particular offences, such as, *murdravit* in murder; *burglariter* in burglary; *rapuit* in rape. These having been long ago established to be necessary in the description of the several offences must be abided by. But there is no rule of law which says that there must be technical words in every case; nor am I inclined to multiply the instances. I once before had occasion to refer to the opinion of a most eminent judge, who was a great crown lawyer, upon this subject, I mean Lord *Hale* (a); who even in his

(a) 2 *Hale*, 193.

time lamented the too great strictness which had been required in indictments, and which had grown to be a blemish and inconvenience in the law; and observed, that more offenders escaped by the over easy ear given to exceptions in indictments than by their own innocence. What is this case? a man gives goods to a carrier to convey to a certain person at another place; the carrier pretends that he delivered them, and that the bailee had given him a receipt for them, but that he had mislaid or left it at home; by which he gets the price of the carriage from the other; and all these pretences the indictment proceeds to charge were untrue; and yet it is objected that it is not alleged with sufficient certainty that he obtained the money by false pretences. But unless there must be some particular arrangement of words in such an indictment, I cannot see how the matter can be rendered more certain. There would be just as much sense in requiring that the indictment should be written in the old *Saxon* character. Take the whole of the indictment together, and the charge appears plain and intelligible; and if the defendant had not known the pretences to be false, it would have been matter of defence for him before the jury.

GROSE, J. I agree that the offence must be substantially alleged, and I think it is so in this indictment. It is alleged that the defendant received money upon certain pretences, and in a subsequent part of the indictment all those pretences are alleged to be false; and it even goes on to state, that by means of such *false* pretences he obtained the money. That was not necessary in my opinion; for it would have been sufficient to have shewn the pretences, and averred them to be false. And all through the indictment charges the several pretences to have been made “unlawfully, knowingly, and designedly,” for the purpose stated. The offence therefore is completely brought within the words and meaning of the statute.

LAWRENCE, J. Every indictment must contain all the circumstances necessary to constitute the crime; and those circumstances must be stated positively without any periphrasis, or intendment. Now here the crime in fact was, that the defendant obtained money from the prosecutor by pretending that he had delivered the goods according to his order; which in truth he had not done. Then does the indictment charge that offence? It alleges that the defendant pretended that he had delivered

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livered the goods, and had taken a receipt for the delivery, which receipt he pretended he had mislaid or left at home; and then the indictment avers every one of these pretences to be false; and that the defendant did all this unlawfully, knowingly, and designedly; which is all that the statute requires: and it is immaterial in what part of the indictment the several allegations are to be found.

LE BLANC, J. concurred in opinion; observing, that there was a positive allegation that the pretences made were false, which was all that the statute required in that respect to bring the case within it.

Judgment affirmed.

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Friday,
Nov. 15th.

WATSON against MARY FOXON.

Under a limitation (after estates for life to A. and B.) of "all and every the said premises to all and every the younger children of B. begotten or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their respective bodies and bona dies as tenants in common, &c. and if only one child, then to such only child and to the heirs of his or her body issuing; and for want of such issue" (a devise of) "the said premises to C. N. &c." (with several limitations over.) "And for want of such issue," then testator divided the said premises between several branches of his family. Held that cross remainders were to be implied between the younger children of B. from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise.

IN assumpsit for money had and received by the defendant to the plaintiff's use, tried before Lord Kenyon, C. J. at Guildhall Sittings in Trinity Term 1801, a verdict was found for the plaintiff for 161*l.* subject to the opinion of this Court on the following case:

An action was brought by the plaintiff to recover 161*l.* paid by him to the defendant in advance on a contract entered into between them for the sale of certain messuages and lands at *Washingborough* in the county of *Lincoln*, and which he seeks to recover on the ground that the defendant cannot make a good title to the premises. The title is as follows:—*Thomas Becke* was seised in fee of the premises in question, and several other estates in *Lincolnshire*, on the 25th October 1755. He had a son, *John Becke*, and two daughters; *Ellen*, who had married *Gervase Gibson*, and *Sarah*, who had married *Charles Newcomen*. *John Becke* had two children, *Thomas Kellest Becke* and *Mary Becke*. *Ellen Gibson* had one daughter, *Ellen*. *Sarah Newcomen* had one daughter, *Mary*, who married *John Foxon*; and had four children, *Thomas*, *Clarissa*, *Charles* and *James*. All these persons were living when *Thomas Becke* made his will, and at the time of his death. On the 25th of October 1755, he

made

made his will, duly executed and attested to pass real estates; and thereby, after providing for his grand-daughter *Mary Becke*, limited the principal part of his estate (not now in question) to his son *John Becke* for life, remainder to *Thomas K. Becke* for life, and so on in strict settlement to the children of *Thomas Kellett Becke*, with divers remainders over to his other children and grand-children; and also limited other premises (not now in question) to his daughter *Ellen Gibson* for life, remainder to his grand-daughter *Ellen Gibson* in tail, with divers remainders over to his other children and grand-children. He devised the premises in question in the words following; “Item. I give and advise all that my farm, with all and every “the messuages, cottages, closes, lands, and tenements to the “same belonging, situate and being in *Washingborough* and “*Heighington* in the county of *Lincoln*, as the same are now in “the tenure of Mr. *Robert Hurton*, his assigns or under- “tenants, together with my fishery there, to my daughter *Sarah Newcomen*, and to my grand-daughter *Mary Foxon*, during “their respective lives, and the life of the longer liver of them, “equally to be divided between them; remainder (to a trustee “and his heirs to preserve contingent remainders). And from “and after the deaths of the said *Sarah Newcomen* and *Mary Foxon*, and of the death of the survivor of them, I give and “devise all and every the said premises to all and every the “younger children of the said *Mary Foxon* begotten or to be begotten, if more than one equally to be divided amongst them, “and to the heirs of their respective body and bodies, to hold as “tenants in common, and not as joint-tenants; and if the said “*Mary Foxon* shall have only one child, then to such only “child and to the heirs of his or her body lawfully issuing; and “for want of such issue, I give and devise the said premises to “my son-in-law Mr. *Charles Newcomen* for the term of his natural life; and from and after his decease, I give and devise “the same to my grandson-in-law Mr. *John Foxon* for the term “of his natural life; and from and after his decease, I give “and devise the said premises to my son *John Becke* for the “term of his natural life; and from and after his decease, I “give and devise the said premises to my grandson *Thomas Kellett Becke*, and to the heirs of his body to be begotten; “and for want of such issue, I give and devise the said premises to my grand-daughter *Mary Becke*, and to the heirs of “her body to be begotten; and for want of such issue, I give “and

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“and devise the said premises to my daughter *Ellen Gibson* for “the term of her natural life; and from and after her decease, I “give and devise the same to my grand-daughter *Ellen Gibson*, “and to the heirs of her body to be begotten; and for want of “such issue, I give and devise the said premises to all and “every the younger children of the said *Ellen Gibson* my “daughter begotten or to be begotten, if more than one equally “to be divided amongst them, and to the heirs of their “respective body and bodies, to hold as tenants in common “and not as joint-tenants; and if my said daughter *Gibson* “shall have only one child, then to such only child and to the “heirs of his or her body lawfully issuing; and for want of “such issue I give and devise *two third parts* of the said pre- “mises to my two nieces *Justina* and *Elizabeth Becke*, and the “other third part of the said premises to the three children of “my niece *Sarah Searby*, and to the heirs of their respective bo- “dies, to hold as tenants in common and not as joint-tenants; “and for want of such, to my own right heirs for ever.” The testator has taken notice by name of all the four children of *Mary Foxon* in different parts of his will. The said *Thomas Becke* died seised in fee of all the said lands in 1758.

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It is admitted that the defendant can make a good title, and that the plaintiff is not entitled to recover, if under the devise above set forth cross-remainders are raised in the premises in question between the younger children of *Mary Foxon*: and that she cannot make a good title, and that the plaintiff is entitled to recover if such cross-remainders cannot be raised. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand, otherwise a nonsuit to be entered.

This case was argued in *Trinity* Term last by *Hullock* for the plaintiff, and *Dampier* for the defendant; and again in this Term by *Gibbs* for the plaintiff, and *The Attorney General* was to have argued for the defendant, but the Court thought it unnecessary to hear him. The arguments ran to great length; but as the cases cited and commented upon have been so often discussed before on similar occasions, and as the Judges in delivering their opinions on the present case went so fully into the subject, both upon general principles of law, and the particular application of them to the will in question, it is unnecessary to detail the arguments urged at the bar. The principle stress was laid by the plaintiff's

counsel

counsel on the word *respective*, in the limitation to the younger children of *Mary Foxon* and the heirs of his and their *respective* body and bodies, &c. as disjoining the title and preventing the raising of cross-remainders between such children: and the opinion of Lord *Hardwicke* in *Comber v. Hill* (a), and *Davenport v. Oldis* (b) thereupon.

Lord KENYON, C. J. Whether if the question were now to be taken up again de novo, the strict rules of construction applicable to deeds were not better to be required in the case of wills, I have always had my doubts. It is now however too late to consider that question; for ever since the statute of wills enabled persons to dispose of their property in that manner, the endeavour has always been to give effect to the intention of the testator so far as it is to be collected from the instrument itself. And such being the rule of construction, it would be deluding parties to do otherwise; after pretending to give them a power to dispose of their property according to their intention, not to give effect to it where it is capable of being ascertained and effectuated. I cannot do better than express my opinion in the words of Lord *Mansfield* in *Pery v. White* (c), that where cross-remainders are to be raised by implication between two and no more, the presumption is in favour of cross-remainders: where they are to be raised between more than two, the presumption is against them: but that presumption may be answered by circumstances of plain and manifest intention either way. Whatever is declaratory of the intention of the party, I take to be expressed. No technical words are necessary to convey an intention: but if taking the whole instrument together there be no doubt of the party's meaning, we arrive at the conclusion. Now here the testator sets out with devising all that his farm, and all and every the messuages, &c. in *W.* and *II.* to his daughter *S. N.* and his grand-daughter *Mary Foxon* for their lives, remainder after the death of the survivor to all and every the younger children of *Mary Foxon*; if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common; and if only one child, then to such only child, and the heirs of his or her body, &c. "And for want of such issue, I give and devise *the said premises*" to my son-in-law *C. N.* (What he meant by *the said premises* is evident, and could not have been rendered clearer by saying *all*

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(a) 2 *St. a.* 969.(b) 1 *Atk.* 579.(c) *Cowp.* 780.

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the said premises; though it might have served to multiply the words.) Then after several limitations, "and for want of such issue," he proceeds to divide the estate into thirds to go to different persons; till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress is laid here upon the word *respective* as disjoining the title; and the authority of Lord *Hardwicke* is referred to in the cases mentioned (a). No person regards whatever fell from that great Judge with more reverence than I do: but it was unworthy of his great learning and ability to lay such stress as he is stated to have done on the word *respective*. Creating a tenancy in common divides the title as much, whether the word *respective* be used or not. And as to what may have been said by other Judges, with reference to the opinion delivered in *Comber v. Hill*, and *Davenport v. Oldis*, in subsequent cases where the word *respective* did not occur; feeling themselves right in the principle on which they proceeded, it is not to be wondered at that they were desirous of relieving their own minds from the weight of Lord *Hardwicke's* opinion by shewing that there was a distinction between the cases in the omission of that word on which he had so much relied: but it is too much to infer from thence that those judges therefore approved of his opinion, or that their judgments were governed solely by that consideration. In deciding this question we are also bound to look to our own opinions delivered in other cases; more especially when those opinions have been revised and approved by higher tribunals. The case of *Atherton v. Pye*, 4 *Term Rep.* 710, was like the present; our opinions there were certified to the Lord Chancellor, and approved by him, and the estate went accordingly. There indeed the devise over, in default of such issue, was of *all* the testator's said lands; and stress was laid by some of us on the word *all* in support of raising cross-remainders between the issue, I will not say by implication, but by what we collected to be the intention of the testator. But the word *all* was not decisive of that case, and in truth makes no difference in the sense; for a devise over of the said premises, or the premises, or all the said premises, means exactly the same thing. Admitting therefore the general rule that the presumption is not in favour of raising cross-remainders by implication between more than two, still that is upon the supposition that nothing

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(a) *Comber v. Hill*, 2 *Str.* 969. *Davenport v. Oldis*, 1 *Atk.* 579.

appears to the contrary from the apparent intention of the testator. I have no doubt here but that the testator intended to give cross-remainders amongst the issue of *M. F.* The devise over of the premises meant *all* the premises: he intended that all the estate should go over at the same time. I think Lord *Mansfield's* quarrel with the case of *Davenport v. Oldis* well founded; and I agree with the cases of *Wright v. Holford (a)*, and *Philpard v. Mansfield (b)*; and I cannot distinguish this case from those. I am clearly of opinion that the intention of the testator is the Polar Star by which we should be guided in the construction of wills where no rule of law is thereby infringed; and here the intention is clear to give cross-remainders.

GROSE, J. The old rule of construction was, that as amongst more than two, the presumption was against cross-remainders by implication; but that being a presumption of intent, it would be most absurd to say that it should prevail against the apparent intention of the testator to the contrary: for that would be no other than saying that that which was to be governed by the testator's intent should be decided in direct opposition to it. (After adverting to the state of the testator's family at the time), the premises are devised amongst the younger children of *Mary Foxon*, his grand-daughter, and the heirs of their respective body or bodies, if more than one, as tenants in common, if only one child, then to such only child and the heirs of his or her body; and for want of *such issue*, then over. The question then is what the remainder-man was to take; in any event, whether there were one or more children, it is plain that he was to take the whole, for the devise to him is of *the said premises*, which must mean the whole, in default of *such issue*, that is in default whether of one or more. And this is rendered still more plain by the subsequent part of the will, where, after other intermediate limitations, the estate is to be divided in several portions, which shews that the testator meant that it should go over entire, till the event in which it was expressly directed to be divided. Then can we say that it was not his intention that the children of *Mary Foxon* should take cross-remainders, without which the estate could not go over altogether to the person to whom it was next limited over. It is true that the word *respective* occurs here in the limitation to the children of *Mary Foxon*, and the

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(a) *Cowp.* 51.(b) *Ib.* 797.

1801. heirs of their respective bodies; and it is as true that there is no case of cross-remainders where that word has been used in the same manner; but that is of no importance: there is no magic in the word; nor can it be said to be of any other consequence than to denote the intention of the testator; but if I find other words which more strongly denote a contrary intent, why should greater deference be paid to that word alone than to all the rest of the will: and as other parts of the will shew a plain intent to give cross-remainders, we cannot construe it otherwise without violating that intention.

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LAWRENCE, J. The rule as laid down in *Gilbert v. Witty, Cro. Jac.* 665. is that cross-remainders shall not be implied between more than two; but in *Cole v. Livingston*, 1 *Ventr.* 224, Lord *Hale* admitted that they might be implied between three, where the words very plainly express the intent of the deviser to be so. And in the more modern case of *Pery v. White, Cowper*, 780, Lord *Mansfield* lays down the rule thus: "Whenever cross-remainders are to be raised by implication between two and no more, the presumption is in favour of them: when they are to be raised between more than two, there the presumption is against cross-remainders: but that presumption may be answered by circumstances of plain manifest intention either way." This is a qualification of the rule laid down in former cases; for they seem to say that there shall not be cross-remainders between more than two. Lord *Hardwicke's* authority leans a good deal that way, and so do the cases of *Comber v. Hill (a)*, and *Williams v. Brown (b)*, and some others. But the true rule is, as I take it, with the qualifications I have stated. In the case now before the Court, cross-remainders are to be raised between more than two, and it is to be seen if there be not circumstances to destroy the presumption against implying them, and it seems to me that there are. At the time that the testator made his will there were four persons in esse who fell within the description of children of *Mary Foxon*: there might be more, or they might be reduced to one, or all might die. To these circumstances he was attentive; for he speaks of the children begotten and to be begotten, and adverts to the possibility of their being one only to be the object of his bounty: and he gives his estate in such way as to shew his intention to be that the children

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(a) 2 *Str.* 969.

(b) *Ib.* 996.

of *Mary Foxon*, however large or small their number might be, should take the whole of the estate; and that he was not influenced by any consideration of their being many or few, or by any preference to those in esse: but that he meant it should be enjoyed by the issue of *Mary Foxon*, whatever their number might be. And if that be so, it would be putting a construction on the will contrary to his intention, not to give cross-remainders; for if other children had come in esse and died without issue, it would have made the situation of the survivors worse than the testator intended it should be if the number of children had not been increased, without that reason subsisting which alone was meant by the testator to have that effect: and an advantage would be given to those in remainder by an after-born child divesting so much of the estate as was intended solely for his benefit, and not for the remainderman. He never could intend that the three children, who were born, should have the whole estate, if no others were born; and that if three others were born, and had died immediately on their birth, that the three eldest and their issue should lose half the estate. I think further that the presumption against cross-remainders may be answered from the circumstance of the devise over of two third parts of the said estate to *Justina* and *Elizabeth Becke*, and of the other third part to the children of *Sarah Searby*. It is a limitation of the said premises: now the said premises are the whole of what was before devised. And it seems to me improbable that the testator could have meant, that his two nieces and the children of a third niece should take otherwise than the whole together, from the very inconsiderable part of the estate which might come to be divided, if they were to take, as the different persons to whom the earlier limitations were made died without issue. For if cross-remainders were not implied, and one of *Mary Foxon's* three younger children had died without issue, and the share of that child, by the failure of intermediate limitations, had gone to the younger children of his daughter *Ellen Gibson*, and she had had a like number of younger children, and one of them had died without issue, there would have been in that case the third of a third or one ninth part to be divided between the two nieces and the children of the other niece; so that all the children of *Sarah Searby* would have taken one 27th part; and if instead of three younger children, there had been six, they

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would have had only one 108th part. In many cases the presumption against cross-remainders has been controlled by circumstances not to my mind stronger. In *Wright v. Holford* (a), the words "in default of such issue" were holden sufficient; there being no words to narrow their effect. In *Phipard v. Mansfield* (b), the Court collected an intention to give cross-remainders from a clause by which the testator gave his personal estate equally to his devisees, and from thence inferred that he intended them equal benefit in his real estate. In *Atherton v. Pye* (c) cross-remainders were implied from its being collected that it was the intention of the testator that the whole of the estate should go over together, from his directing that in default of issue, *all* the premises should go to his right heirs; and yet that was but tautology, for *the premises* and *all the premises* are the same thing. In *Doe v. Burville* (d), where the testator, after giving

(a) *Corp.* 31.(b) *Ib.* 797.(c) 4 *Term Rep.* 710.

(d) The following note of this case is taken from the MS. of Mr. Justice Ashhurst, compared with another note taken by Mr. Justice Buller when at the bar :

DOE on the Demise of BURDEN against BURVILLE. *E.* 13 *Geo.* 3. *B. R.*

In ejectment the following case was reserved for the opinion of this Court :

A devise by A. (having 5 sons and 7 daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to

George Charlton by his will, dated 30th June 1707, devised unto trustees and their heirs, his dwelling-house and lands thereunto belonging, with the appurtenances, upon trust for the use of his wife Elizabeth for life; and after her decease to the use of his son James for life, without impeachment of waste; and after his decease to the use of the heirs males of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son John for life, without impeachment of waste; and after his decease to the use of the heirs males of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son George for life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of all and every his (the testator's) daughter and daughters as tenants in common (if two or more) and not as joint-tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother Abraham for ever. And he also devised to the same trustees and their heirs another estate in *Healdorne* upon trust for the use of his said wife for her natural life, without impeachment of waste, charged and chargeable with the payment of one annuity or yearly rent-charge of 30*l.* tax free to his son John, payable half yearly during his life. And from and after the decease of his said wife upon further trust to permit his said son John to receive the rents and profits for his life, without impeachment of waste; and after his decease to the

giving to his three sons estates in tail general, with cross-remainders in default of their issue, limited the estate to all and *every the testator's daughter and daughters, as tenants in common,

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the use of the heirs males of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son *George* for life, without impeachment of waste; and after his decease to the use of the heirs males of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son *James* for life, without impeachment of waste; and after his decease to the use of the heirs males of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to all and every his daughter and daughters as tenants in common (if two or more) and not as joint-tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother *Abraham* for ever. All the sons are dead without issue. All the daughters, who were seven in number, surviving the father, died in the lifetime of the surviving son *John*. The question was, Whether by this will there were cross-remainders raised between the daughters? If there were, the verdict to stand for a moiety of all the premises devised to *James* and *John*. If not, then a nonsuit to be entered.

the heirs of the devisors brother; gives cross-remainders to the daughters. Between more than two the presumption is against cross-remainders; but this may be controlled by a plain intention to the contrary.

After argument by *Cox* for the plaintiff, and *Wallace* contra;

* Lord *Mansfield*, C. J. delivered the opinion of the Court.—The question is, Whether there are cross-remainders between the daughters? A limitation of cross-remainders might without doubt have been made in express words: The question then is, Whether the testator has used such words as to shew his meaning that there should be cross-remainders? No technical words are necessary in a will; if the testator's meaning sufficiently appear, it ought to be carried into effect. The argument at the bar turned not upon the intention, but upon the rule of construction which has been echoed from the case of *Gilbert v. Witty* down to the present time, that there shall not be cross-remainders by implication between more than two. The reason given for it, namely, to avoid the splitting of tenures, could only be used as an argument against the testator's intent. This rule has been so often repeated, that, though not solemnly adjudged in any case which turned on that point, yet it has been so often recognized that it ought not to be shaken. But the true sense of the rule is, that between two the presumption is in favour of cross-remainders; between more than two the presumption is against them; but in either case the intention of the testator may control the presumption. In *Comber v. Hill*, and *Williams v. Brown*, though between two only, the word *respective* controlled the construction of cross-remainders. In *Cole v. Livingston* (1), and the case in *Dy.* 303, though between more than two, yet it was holden there should be cross-remainders from the plain intention of the parties. The case in *Dyer*, which was, where *A.* had five sons to whom he devised, was determined upon the words, *if they all die*. *Cole v. Livingston* has adjudged *Gilbert v. Witty* to be good law; for the judges said, there shall not

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(1) 1 *Ventr.* 224.

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mon, if two or more, and not as joint-tenants, and to the heirs of her and their bodies issuing, remainder to the heirs of his brother. *Lord *Mansfield* relied on the use of the word *remainder* being in the singular number, and on the necessity of all the daughters of each of the testator's sons dying without issue before the remainder to the other sons would take place, as circumstances to shew that cross-remainders were intended between his own daughters. The counsel for the plaintiff have most relied on the deviser having given the estate to the heirs of

be cross-remainders between more than two, unless the words plainly express the intent. In *Marryat v. Townly* (1), Lord *Hardwicke* says the law will not admit of cross-remainders between more than two: but that is by implication only; but where the intention is plain, it is otherwise: and there he held the word *joint-tenants* to explain it. In *Miller v. Moore*, 13 *Geo. 2.* Lord C. J. *Lee* said, "where the devise is to three or more, cross-remainders cannot be held, unless the intent be plain and unavoidable; and then the Court may be forced to determine it to be cross-remainders." The question then is, under these authorities, Whether the intent here is so plain and unavoidable as that it cannot be effectuated without giving cross-remainders? and we think that it is plain and unavoidable to give cross-remainders. The testator had three sons, to each of whom he gives several estates in tail. His plan was to follow the course of descent, by preferring even the female line of each of his sons (in failure of the male) before his other sons and their male line, and before his own daughters. He thought the coming to his daughters a remote contingency; he therefore makes use of the words "daughter and daughters; all and every; if two or more;" supposing that the number might be reduced before they might become entitled. He takes for granted that a remainder to his brother *Abraham*, who was alive when he made the will, could not take place till failure of his own issue; therefore he limits the remainder to the heirs of his brother *Abraham*, supposing it not likely to happen in his time. He also limits the remainder in the singular number; conceiving that it could not take effect till the death of the last daughter without issue. We think these words are equivalent to an express declaration that there shall be cross-remainders. In all the limitations the female line of each son must fail, before the male line of the other sons shall take, and all must fail before the daughters could take: then it would be absurd to suppose that he meant to devise over the shares of any of his own daughters dying from the rest, when he had not done so by his son's daughters; or that he should have given to the heirs of his brother the share of one of his own daughters dying while any of them were left; for if *Abraham* had no children, then the daughters would be his heirs. Therefore we think he has given all his daughters the estate with cross-remainders as fully as if he had given them in the most express words. Consequently the verdict must be entered for a moiety of the premises devised to *James* and *John*.

the *respective* bodies of the children, as a circumstance to shew that cross-remainders were not intended; and have cited the cases of *Comber v. Hill*, *Davenport v. Oldis*, and *Brown v. Williams*. As in those cases the limitations are not in the same words with the limitation in this case, I do not feel myself pressed by them: there is no principle extracted from them which I mean to controvert. And where a case is cited not for the sake of some principle or rule, but to shew that certain expressions cannot or must have this or that construction put on them, such cases can only rule other cases where the subject-matter of construction is not to be distinguished. The word *respectively* has no uncontrollable force to prevent cross-remainders: the intention of the testator may be collected from that word to shew that he did not mean cross-remainders, but that inference may be restrained by other words; according to what was said in *Doe v. Dorvell (a)*. In this case I understand the word *issue* to mean “all and every the younger children of *Mary Foxon*, “begotten or to be begotten, and the heirs of their respective “body and bodies;” and as long as any of her children or the heirs of their bodies are in esse, there is not a want of such issue. It is true that in *Comber v. Hill*, and in *Davenport v. Oldis*, Lord *Hardwicke*, in the construction he put on the wills in those cases, referred the word *respective* to the heirs of the bodies: but there it could not be referred to the first takers of any estate of inheritance, because the limitations were to certain persons by name, and not to persons falling under the general description of children begotten or to be begotten, to whom *issue* will fairly apply in this case. The case which is nearest the present is that of *Williams v. Brown (b)*, in which, according to the account of it in *Barnardiston*, the Court did not decide against cross-remainders but with great difficulty. But in that case the limitation was materially different; for that was a limitation to all and every the child and children born or to be born of the body of *Mehetabel*, equally to be divided between them and the heirs of their respective bodies; and for want of such *heirs* remainder over. Now the word *heirs* was not applicable to the words “child and children,” but was according to all rules of construction necessarily referable to the same word which just preceded it. There was not a limitation over, like the one I have pointed out, to the nieces after other intervening limita-

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(a) 8 Term. Rep. 513. (b) 2 Barnard, 231. and 2 Stra. 996.

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tions; which limitation is rational enough if cross-remainders are implied from the certain defined benefit the two nieces and children of the third would in such case take; but, as it seems to me, if cross-remainders are not implied, the benefit is too uncertain, and in events not improbable, too inconsiderable ever to have been intended by the testator.

LE BLANC, J. This is a question of intention, which is to be collected from the words of the will according to the rule which has been established in this respect; which rule I take to be, that if cross-remainders are to be implied between two only, the presumption is in favour of raising cross-remainders, unless the Court see any thing in the will which shews that the testator meant otherwise. But if cross-remainders are to be implied between more than two, then the Court must look to the will to see if there be any words from whence such an intent is to be collected, in order to rebut the presumption of a contrary intent. Here the testator devises to the younger children of *M. F.* and the heirs of their *respective* body and bodies, to hold as tenants in common, &c. and the word *respective* is relied on as shewing an intention to sever the title, and against cross-remainders.—

But where would have been the difference if he had omitted the word *respective*? It has no effect beyond giving an estate in severalty to each of the younger children and their heirs, as tenants in common, which would equally have been effected by the tenancy in common, without the use of the word *respective*. Therefore unless the use of that word shew a different intent in the testator, I cannot distinguish this case from any other where it was omitted in a devise of the same kind. The Court however have been pressed with former decisions where stress was laid upon that word, as in *Davenport v. Oldis*, and *Comber v. Hill*; and with subsequent cases in which the former were recognized. Of the latter it is sufficient to observe, that the

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Judges went expressly upon the apparent intent of the testator; and it was a ready answer to give to the former decisions, that they were distinguishable from the cases then before them in having the word *respective*. But all the latter decisions establish the principle, that cross-remainders may be raised by implication even between more than two, where the intent is clear to that purpose. Now I collect such an intent in the present case from the limitation to *all and every* the younger children, and the heirs of their bodies, if more than one, as tenants in common; if

if *only one*, to such only child, and the heirs of his or her body, and in default of such issue then over: and in the subsequent part where he foresees the possibility of all the children dying without issue, the testator divides the estate amongst different branches of his family; which shews that till that period he intended that it should go over entire. Therefore, without breaking into any rule of law, I think the intention so plain as to rebut the presumption against cross-remainders; and where such an intent is apparent, the rule of law is to raise cross-remainders.

Postea to the Defendant (a).

(a) *Vide* cases on cross-remainders collected in Mr. Serjeant Williams's note on *Cook v. Gerrard*, 1 Saund. 185. To which may be added, *Doe v. Cooper*, 1 East's Rep. 229. and *Doe v. Warsley*, ib. 416.

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The KING *against* The Inhabitants of FERRY FRYSTONE,
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Saturday,
Nov. 14th.

TWO justices by an order removed *Catherine Hill*, the wife of *John Hill* deceased, and her four children by name, from the township of *Leeds* to the township of *Ferry Frystone*, both in the West Riding of the county of *York*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case stating; that upon hearing of the appeal the respondents in support of the order of removal produced the pauper *Catherine Hill* as a witness; who deposed, "that she was the widow of *John Hill*, and that she had heard the said *J. Hill* in his lifetime say, that his settlement was at *Ferrybridge*, which he said he gained by hiring with and serving one *J. Hawkshead*, a bricklayer in *Ferrybridge*, for a year." The respondents then gave in evidence the examination, of which the following is a copy: "East Riding of the county of *York*.—The examination of *John Hill*, late in the Royal Artillery, now residing at *Kilnwick* in the said Riding, taken upon oath this 15th day of *April*, 1788; who saith, that his legal settlement is at *Ferrybridge*; that he acquired the same by servitude, namely, by being hired for one whole year, and serving the said year with *J. H.* bricklayer of *Ferrybridge*; and that he had not gained any legal settlement elsewhere since to the best of his knowledge and belief." (Signed and attested.) No proceedings were had in consequence

Neither the hearsay of a pauper who is dead, nor his ex-parte examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement.

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sequence of this examination until the order of removal, which is the subject of this appeal, was applied for, and made. The respondents did not offer any other evidence than what is above stated in support of the order of removal: upon which the counsel for the appellants objected both to the admissibility of the testimony of the said *Catherine Hill* so given by her as aforesaid, and also of the said examination in evidence. The Sessions, however, thinking the evidence above stated to be sufficient proof of the pauper's settlement in *Ferrybridge*, confirmed the order, subject to the opinion of this Court. It was afterwards certified, that *Ferry Frystone* and *Ferrybridge* are one and the same township.

Topping and *Heywood*, in support of the order of Sessions, (after an ineffectual application to have the case sent down to be reheard by the Sessions,) said, that they could not add any thing to the argument of Mr. Justice *Buller* in the case of *The King v. Eriswell (a)*, in support of the admissibility of the evidence.

Christian, contrà was stopped by the Court.

LORD KENYON, C. J. The point upon which the Court were divided in opinion, in the case of *The King v. Eriswell*, has been since considered to be so clear against the admissibility of the evidence, either as to the hearsay of the pauper or his examination in writing, that it was abandoned by the counsel at the bar in the case of *The King v. Newnham Courtney (b)* without argument. It is true, there was no evidence there that the pauper, whose examination had been admitted in evidence, was dead: but our opinion against the general doctrine laid down by the two Judges who supported the reception of the evidence in the former case was pretty broadly hinted. And to be sure that point may now be considered to be at rest.

Per Curiam,

Both Orders quashed (c).

(a) 5 Term Rep. 707. 712.

(b) 1 East's Rep. 573.

(c) Vide *Rex v. Chadderton*, ante, 27. and *Rex v. Abergwyilly*, post, 63.

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Tuesday,
Nov. 17th.

DAVIDSON against MOSCROP.

A custom to swear the jurors at one court leet to inquire, and return their presentments at the next court, is bad in law.

IN replevin the defendant made cognizance as bailiff of Sir *James Graham*, Bart. and justified, 1st, That the locus in

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quo from time immemorial has been within and part and parcel of the manor of *Nichol Forest*, in the county of *Cumberland*, of which Sir *James* was seised in his demesne as of fee and that from time immemorial the lords of the manor have been used and accustomed to hold a court leet and view of frankpledge within the manor twice a year, &c. of all the inhabitants and resiants within the manor before the steward, &c. That the plaintiff, before and at the time of holding the court after-mentioned, and from thence continually until and at the time when, &c. was, and from thence continually hitherto, has been, and still is an inhabitant and resiant within the manor, and subject to the jurisdiction of the said Court; and that before the said time when, &c. and whilst Sir *James* was so seised, &c. and whilst the plaintiff so was an inhabitant and resiant, &c. and before the holding of the said Court after-mentioned, viz. on 28th *September* 1800, due notice was given to the inhabitants and resiants within the manor to appear at the then next court leet, &c. within one month after *Michaelmas*, &c. viz. on 1st *October* 1800, to do suit and service there: that on the said 1st *October*, a court leet and view of frankpledge was in due manner and form holden in and for the manor before the steward, according to the custom, &c. at which court the plaintiff, so being such inhabitant and resiant as aforesaid, though called, did not appear, but made default; whereupon the plaintiff was then and there by the said steward in the said court fined 40s. for his said default, whereof he had due notice, &c. but though demanded, has refused to pay the said 40s. wherefore the defendant distrained, &c. The second cognizance stated in like manner that Sir *James Graham* was seised of the manor, and had a prescriptive right to hold a court leet and view of frankpledge twice a year, within a month after *Easter* and *Michaelmas*, of all the inhabitants and resiants within the manor, before the steward, &c. And it further stated an immemorial custom within the manor, that the jurors sworn in every court leet and view of frankpledge so holden, &c. have been and ought to be charged and sworn in the said court to inquire into and present those things which to the said court belong, &c. and to return such their presentment at the then next court to be holden, &c. and in default of their so doing, the steward of the said next Court has, during all the time aforesaid, been used and accustomed, and of right ought to set a certain reasonable fine upon every such juror making such default for the use of the lord, &c. and then set forth

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forth another immemorial custom to *distrain* for such fine. It then averred that the plaintiff, before and at the time of holding the court after-mentioned, and from thence continually, and at the said time when, &c. was and still is an inhabitant and resiant within the manor, and subject to the jurisdiction of the said court; and that whilst he was such inhabitant, and resiant, viz. on 16th *April* 1800 (within a month after *Easter*), a court leet and view of frankpledge of the inhabitants and resiants within the manor was holden in and for the same, before the steward, according to the custom, &c. at which said court the plaintiff, so being such inhabitant and resiant, appeared, &c. and was then and there, with the rest of the jurors present, duly sworn and charged to inquire into and present, &c. *and to return such presentments at the Court then next to be holden* in and for the manor, &c. That afterwards, viz. on 28th *September* 1800, due notice was given to the inhabitants and resiants, &c. to appear at the then next court leet, &c. within a month after *Michaelmas*, &c. viz. on 1st *October* 1800, and that on the said 1st *October* the said court was holden before the steward, &c. being the next court, &c. after the plaintiff was so sworn and charged as aforesaid; at *which said last-mentioned Court* the said plaintiff so being such inhabitant and resiant as aforesaid, and having been so sworn and charged as aforesaid, though called, *did not appear to return any presentments, or to do suit and service there*, but therein made default; whereupon he was then and there by the said steward, in the said court, according to the said custom, fined 40s. for the use of the lord, &c. for his said default; (the said fine then and there being *a reasonable fine* on the said occasion) whereof the plaintiff had notice; but though required, has refused to pay the same, &c. wherefore the defendant, as bailiff, &c. distrained, &c.

To this the plaintiff demurred, and assigned for special cause as to the first cognizance, that it does not therein appear that the said fine of 40s. was a reasonable fine on that occasion. And as to the second cognizance, that it is not alleged that any of the rest of the jurors who, besides the plaintiff, are alleged to have been sworn and charged at the court therein first-mentioned to have been holden, were resiants or inhabitants within the manor at the time of holding the court therein last-mentioned; so as that it might appear that there were a proper or sufficient number of the jurors who were sworn at the said first court,

court, resiant and inhabitant within the manor, to make any presentments at the last-mentioned court, &c. and also for that it does not appear by the said cognizance that any presentments were in fact omitted at the last-mentioned court, &c. or that there was any default in any presentments being made at such court. And also the general causes of demurrer were assigned.

Littledale, who argued in support of the demurrer, did not touch upon the special causes assigned against the second cognizance, but objected as to the first cognizance, that the steward of a court leet has no authority to impose a fine for the non-attendance of a suitor; but according to *Hall v. Turbett* (a) there ought first to have been a presentment. And by the same case the party should rather be amerced than fined; for if the fine be too grievous he has no remedy; but for amerciements a moderata misericordia lieth. And the distinction is taken in *Griesley's* case (b), that as to contempts and disturbances in the court, as by refusal to be sworn, it being a court of record, the steward as judge may set a reasonable fine; but for acts or offences out of court, the party ought to be presented and amerced by the jury. *Bro. tit. Leete*, &c. pl. 29. 1 *Roll. Abr.* 219. & *Dy.* 211. b. also notice the like cases in which the steward may fine: and the doctrine laid down in *Godfrey's* case (c) is to the same purpose; where it is also said that the fine must be reasonable: (which is confirmed by 4 *Inst.* 261) and if unreasonable it may be avoided by plea. Wherefore it seems that it ought to have been averred here to be a reasonable fine, that issue might have been taken on it. [*Lawrence, J.* There are precedents of pleading in *Co. Entr.* 571, 572. where there is no averment of the reasonableness of the fine: and in *Godfrey's* case it is said, that the justices are to judge of the reasonableness of the fine.] Perhaps it might be good on general demurrer. As to the second cognizance, there are three objections. 1. It goes to compel every person who attended at one court to attend at the subsequent court, and so on at the succeeding courts, whether or not they continue resiants within the manor. 2. It is a custom against the policy of the law, and the due administration of justice, that the jury should be charged at one court leet, and make their presentments at another. 3. It is void as empowering the steward to impose a fine for non-attendance at the sub-

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(a) *Cro. Eliz.* 241.(b) 5 *Co.* 38. b. and *Sav.* 93.(c) 11 *Co.* 42, 44. and 1 *Roll. R.* 73.

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sequent court, when by law he can have no such authority.

1. None but resiants are required to attend courts leet; and at common law none are to attend for lands holden within the manor; because it is a personal service, and not by reason of tenure. *Dalt. Off. of Sheriff*, 387. 2 *Hawk. Ch.* 10. s. 2. 12. 2 *Inst.* 99. 122. *Fitz. N. B.* 160 (a). Besides, a custom to compel persons not resiants to attend is unreasonable, because it either has the effect of obliging them to continual residence, or it subjects them to great inconvenience and expense in coming from a distance. And this attendance would be without intermission after it once commenced; for at each court the same persons would be sworn to attend at the ensuing court. The unreasonableness of such a custom is still more apparent if, as is said in 1 *Rol. Abr.* 542. the steward may, in case of a deficiency of resiants, compel a sojourner, or even a stranger accidentally passing by, to be sworn of the jury. 2. It is contrary to the rule and practice of all Courts in the Realm, that jurors should be sworn at one court to attend and make their presentments at another; but they ought to inquire immediately after they are sworn. If it were otherwise, it would expose the jurors to be tampered with or influenced, and to engage in corrupt practices, detrimental to the general administration of justice. It is in direct contravention to the statute of *Westminster* 2. (13 *Ed.* 1.) c. 13. (b) which directs all indictments, &c. to be by twelve jurors at least: whereas, if the indictments were not to be found till the next court after the jury were sworn, there may not be twelve left to make them. The court is comprised of the steward and jurors, the latter of whom being a fluctuating body, as soon as the court ends the jurors are necessarily functi officio. This then being laid as a custom, not merely to adjourn the same court from day to day, but to adjourn from one court to another, tends to perpetuate the jury, and render them a permanent body at the will of the steward. In the *Duke of Bedford v. Alcock* (c), a custom stated for ale-conners sworn at one court to examine the weight of baker's bread, and present offenders at the next, was objected to; but the case went off on another point. The same point was doubted

(a) 4to Edit. 375.

(b) This statute extends only to such offences for which the party may be imprisoned. *Colbrook v. Elliott*, 3 *Burr.* 1861.

(c) 1 *Wils.* 248.

in *Moore v. Wicker* (a), and *Probyn and Chapple Js.* thought that the jurisdiction of a leet jury, like that of a grand jury, was confined to things happening before their swearing, or during their sitting. 3. The steward having no power by general law to impose a fine for any offence committed out of court, a custom to enable him to do that which the law denies him on account of the grievance to the subject, is void. The lord of the leet can only claim by grant or prescription, which supposes a grant; and the king can only grant such powers as are permitted by the law in that respect. As the king could not grant such a power of imposing fines to the sheriff for the public use, a fortiori, he could not make such a grant to any for his private use. This is not a custom arising out of the tenure of lands to which arbitrary conditions may be annexed at the will of the grantor, but is claimed in respect of mere resiancy.

Wood contrà, as to the first cognizance, admitted that the case of *Hall v. Turbett* (b), if law, was decisive against it: but observed that the distinction taken there did not apply to the case; for when the juror is called in court and does not appear, that is a fact which passes in the steward's presence in court, and therefore seems rather to fall within that class of cases where he may impose a fine, inasmuch as he does not require to be informed of any fact by the jury. Here the party is stated to have been a resiant during the whole time, and therefore the arguments which have been urged against the reasonableness of the custom with regard to non-resiants do not apply. The reasonableness of the fine is not cognizable by the jury, but by the court, according to the authority of *Godfrey's* case, before referred to. If it be unreasonable, the steward is subject to a criminal prosecution; but that question cannot be tried collaterally in a civil action. At any rate, however, there is no objection on that score to the second cognizance, where the fine is averred to be reasonable. The general objection does indeed apply also to the second cognizance. There is no case in point which determines that a custom to swear jurors at one court to make presentments at the next is bad in law: the practice is not unfrequent to do so: and it is reasonable, inasmuch as it gives the jury more time for deliberation.

LORD KENYON, C. J. I never heard of such a practice prevailing. The case of the *Duke of Bedford v. Alcock*, where

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against
MOSCRUP.

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(a) *Andr.* 47.(b) *Cro. Eliz.* 241.

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against
MOSCROP.

something of the kind was stated, went off on the count for the mutuatus, which got rid of the question. The convenience of the thing is much the other way. It would open a door to great abuses. Besides, as far as these courts are of any use at the present day, it is to return small offences, such as require immediate attention and redress. And if grand juries inquiring for a whole county, are presumed to be, and prove themselves competent to make their presentments at the same courts at which they are sworn, there seems no reason why a jurisdiction of so much less moment should require longer time for deliberation. Upon the whole I see no colour for supporting such a custom.

Per Curiam,

Judgment for the Plaintiff.

Wednesday,
Nov. 18th.

The KING *against* The Inhabitants of ABERGWILLY.

An ex-parte examination in writing of a pauper touching his settlement cannot be received in evidence of such settlement, tho' he be dead.

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TWO justices by an order removed *Ann*, the widow of *Benjamin Jones*, deceased, and her children by name, from the borough of *Newport*, in the county of *Monmouth*, to the parish of *Abergwilly*, in the county of *Carmarthen*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on a case; setting forth in the first place the examination of *Ann Jones*, taken before two magistrates, upon which the order of removal was founded; in which examination it was stated "that her husband informed *her after their marriage "that his last legal settlement was then in the parish of *Abergwilly*, by hiring and service by the year to one *J. H.* there," (which was the only matter touching the settlement in *Abergwilly*.) The case then stated, that upon the trial of the appeal, the pauper, *Ann Jones*, upon her examination in Court, denied having ever heard her husband say where he was a parishioner; upon which the Court resorted to a written examination of the husband's, taken before two magistrates, soon after his marriage, but which, in the opinion of the Court, was never acted upon in any manner until the hearing of the appeal. In that examination (which was set forth verbatim in the case) the husband swore to a settlement in *Abergwilly*, by hiring for a year, and service there for a much longer period, with *J. H.*; and that he had done no other act to gain a settle-

settlement elsewhere. It was contended on the part of the appellants, that the Court ought not to have resorted to the examination either of the husband, who was dead, or of the pauper herself.

Abbott, who was to have argued in support of the order of Sessions, admitted that it could not be supported after the recent determination of the Court (a) against the admissibility of that species of evidence upon which the Court had formerly been divided in opinion in the case of *The King v. Eriswell* (b): and against the reception of which evidence the present judges of the Court had intimated a strong opinion in *R. v. Nuneham Courtney* (c).

The Court assenting, the rule was made absolute for quashing both orders.

Gibbs and *Milles* in support of the rule.

(a) In *R. v. Ferry Frystone*, ante, 54.

(b) 3 Term. Rep. 707.

(c) Ante, 1 vol. 373.

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against
The Inhabitants of
ABER-
GWILLY.

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The KING against The Inhabitants of WANTAGE.

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TWO justices, by an order, removed *Robert Puzey*, clerk, from the township of *Wantage* to the parish of *East Lockinge*, both in the county of *Berks*.

On appeal to the Sessions, a case was reserved stating, that in the year 1784 *R. Puzey*, clerk, was nominated by the then rector of the parish and parish church of *East Lockinge* to be curate of the same, and was licensed to perform the office (a) of curate in the said parish and parish church by the then bishop of the diocese, who assigned to him the yearly stipend of 45*l.* (b). That the pauper entered on the said curacy in the same year, and performed the duties thereof for six years, during which time he resided in the parsonage-house within the said parish, and that he gained no subsequent settlement.

A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate, at a certain annual stipend, is yet not such an annual officer as is entitled to a settlement by virtue of the stat. 3 W. 3. c. 11. s. 6.

(a) The bishop's licence, which accompanied the case, authorises the party during pleasure "to perform the office of curate in the parish, &c. in reading "the Common Prayer and performing other ecclesiastical duties belonging "to the said office according to the form prescribed in the book of Common "Prayer," &c.

(b) This is by virtue of the stat. 12 Ann. st. 2. c. 12.

The

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The KING
against
The Inhabi-
tants of
WANTAGE.

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The Sessions were of opinion that this was no service of an annual public office or charge under the Act, and quashed the order of removal subject to the opinion of this Court on the above case.

When the case was called on, Lord *Kenyon*, C. J. said, that it was impossible to argue against the conclusion which the Sessions had drawn. There was no pretence to say that this was an office within the meaning of the Act of King *William*, (*a*), the executing of which for a year would give a settlement. That statute was evidently intended to be confined to inferior annual officers, such as constables and the like, known to the parish; and though in some instances the construction had been carried further, yet he was not inclined to extend it to cases still further from the contemplation of the Legislature.

Gibbs and *Saxton* in support of the order of Sessions.

Const, *contra*, referred to *Helsington v. Over* (*b*), where, though the settlement was denied, yet the Court did not appear to proceed so much on the ground that the curate himself would not have been considered as an annual officer within the parish, as that the sequestrator, whose settlement was in question, was merely a deputy, whose function might be determined at any time.

Per Curiam,

Order of Sessions confirmed.

(*a*) 3 W. 3. c. 11. s. 6.

(*b*) Burr. S. C. 746.

Wednesday,
Nov. 18th.

The KING against The Inhabitants of MOOR CRITCHELL.

Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the said county, although the proper county were named in the margin, and were also named last before such description of the justices.

TWO justices, by an order, removed *D. Spearing*, his wife and children, from the parish of *Donhead St. Mary*, in the county of *Wilts*, to the parish of *Moor Critchell*, in the county of *Dorset*. The Sessions, on appeal, confirmed the order. But both orders *being removed by certiorari into this Court, a rule was obtained, calling on the parish officers of *Donhead St. Mary* to shew cause why they should not be quashed, for a default of jurisdiction in the magistrates making the original order apparent upon the face of it, in not stating them to be

justices

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justices of the peace of the county of *Wilts.* The order was in this form:

“*Wilts*, to wit.—To the churchwardens and overseers of the “poor of the parish of *Donhead St. Mary, in the county of Wilts* aforesaid, to remove and convey, and to the churchwardens and overseers of the poor of the parish of *Moor Critchell in the county of Dorset*, to receive; these.—Whereas complaint hath been made by you, the churchwardens, &c. of *Donhead St. Mary, in the county of Wilts* aforesaid, unto us whose hands and seals are hereunto subscribed and set, being two of his Majesty’s justices of the peace in and for the said county, (one whereof is of the quorum,) that *D. Spearing*, &c. are come to inhabit, &c. (pursuing the usual form of such “orders).”

Burrough and *Casherd* now shewed cause, and contended, 1st, that the words—“justices of the peace in and for the said county,” must have reference to the county in the margin, which is *Wilts*: 2dly, That it has reference in grammatical construction to the last antecedent county mentioned, which is also *Wilts*. And further, That from the whole scope of the order, it appears that it could only have been made by magistrates of *Wilts*, and not of *Dorset*. But,

The Court were clearly of opinion, that the objection was fatal (a). It ought expressly to appear that the justices had jurisdiction to make the order, and therefore there having been two counties mentioned before, they ought to have stated of which county they were justices. But Lord *Kenyon*, C. J. added his regret that the objection had been taken, as the decision would conclude nothing: for the Court would direct a special entry to be made, in order to denote that the orders were quashed for want of form. And that it was to be lamented that the stat. 5 *Geo.* 2. c. 19. which was intended to give the justices in sessions a power of amending orders of removal which were defective in point of form, had, by the construction which had been put upon it, been rendered a dead letter, as all defects of this sort had been considered to be matters of substance and not of form.

Gibbs and *Dampier* were to have argued in support of the rule.

Rule absolute.

(a) Vide *R. v. Stepney*, *Burr.* S. C. 23. and *R. v. Chilverscoton*, 3 *Term Rep.* 178.

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against
The Inhabitants of
Moor
CRITCHELL.

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1801.

Saturday,
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An exciseman who was rated for his salary, which was in fact paid by the collector without any deduction from the salary, does not thereby give a settlement.

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The KING *against* The INHABITANTS of WEOBLY.

TWO justices by an order removed *H. Williams, Elizabeth* his wife, and their two children, by name, from the parish of *Weobly*, in the county of *Hereford*, to the parish of *New Radnor*, in the county of *Radnor*. The Sessions on appeal quashed the order, subject to the opinion of this Court on a case stating. That the pauper *H. Williams* was born in the parish of *New Radnor*, and *being formerly an officer of excise, was in the year 1790 resident in that capacity in the borough and parish of *Weobly*; and during such residence was rated to the land tax in that parish for his salary: which was proved by the production of the land tax assessment; but it appeared by the evidence of the pauper, that he never paid such rate himself, or any rate; the same being paid by the collector of excise, and not deducted out of the pauper's salary. The Sessions were of opinion that the pauper gained a settlement in *Weobly* by the rating and payment as before stated.

Gibbs in support of the original order said, that it was clear that a person must pay as well as be rated in order to gain a settlement; and here the pauper, though rated, had not paid either in fact by his own hand, or constructively by the hand of another; for the payment made by the collector was not deducted out of the pauper's salary.

Garrow in support of the order of Sessions contended, that this was in effect a payment by the pauper, being made by another for him, and as his agent. That the amount not having been deducted from the pauper's salary made no difference; for whether the money were given him to pay for himself, or were voluntarily paid by another on his account was the same thing.

Lord KENYON, C. J. We cannot do better than abide by the Act of Parliament (*a*), which requires both that the pauper should be rated and should pay in order to gain a settlement. If the rate had been paid by him through the medium or by the hands of another, that would have been a payment by himself; but here he neither paid it mediately or immediately. He was not affected by the payment at all. It was not deducted out of his salary, nor was his income diminished by it. I know that the statute in question has been extended by construction much

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(a) 3 W. 3. c. 11. s. 6.

beyond what was apparently intended by the Legislature. It has been decided, that being rated and paying to the land tax will gain a settlement, though, if it were *res integra*, I should rather think that the Act was intended to be confined to parish rates. However, that having been decided otherwise, I shall not now disturb it. But this being a new case, where the pauper neither in fact paid the rate himself, nor constructively by the hands of his agent, it is better to abide by the letter and true spirit of the statute, and to hold that he did not thereby gain a settlement.

Per Curiam,

Order of Sessions quashed.

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The KING
against
The Inhabitants of
WEOBLY.

The KING against HOLLAND.

Saturday,
Nov. 21st.

AN information in nature of quo warranto was exhibited against the defendant for claiming and exercising the office of freeman [71] of the borough of *Okehampton*, in the county of *Devon*, without any legal warrant. The defendant pleaded, that *Okehampton* is an ancient borough, consisting of an indefinite number of freemen, and that the burgesses, till the acceptance of the charter of *James* the First, were a corporation by prescription under various names, viz. "the burgesses of the free borough of *O.*", "the portreeve and commonalty of the borough," &c. and "the mayor and burgesses of the town and borough," &c.; and from the granting of the said charter till the surrender thereof by the name of "the mayor and burgesses of the town and borough," &c. and from such surrender until the charter of *Charles* 2., by the name of "the mayor and burgesses of the borough," &c.: and since then by the same name last-mentioned: and during all the time there have been an indefinite number of freemen. The plea then set forth the charter of the 21st. *James* 1., whereby he granted that *Okehampton* should be a free town and free borough, and a corporation, by the name of the mayor and burgesses of the town and borough of *O.*; that there should

Where a power of creating freemen is shewn to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect, even supposing such a power

could be transferred by a by-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of *James* 1. and *Charles* 2. had been since those charters, &c. continually exercised by the select body in question, and although such charters contained a confirmation of all former privileges, &c. under whatever names of incorporation theretofore enjoyed.

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be one of the burgesses to be called mayor, eight inhabitants of the town and borough called principal burgesses, eight other inhabitants of the town and borough or precincts called assistants; that the seven principal burgesses (exclusive of the mayor) and the assistants should be the common council. The charter then proceeded to appoint the first mayor, and seven others as principal burgesses, and eight assistants, and appointed the election of mayor to be on the *Monday* after *Michaelmas*, by the former mayor nominating two of the principal burgesses, one of whom should be chosen by the other principal burgesses not named and the assistants, or the major part of them, and should hold his office for a year and until another mayor was chosen. And the same charter contained a ratification of all ancient rights, prescriptions, customs, privileges, &c. to the same corporation, under the several names of incorporation before mentioned.—The plea then stated the acceptance of the charter. And that afterwards in the 34th *Car. 2.* the same was surrendered, and such surrender enrolled; and that *Charles 2d* by his charter in the 36 *Car. 2.* granted them to be a corporation by the same name as in the former charter; and that one of the burgesses should be mayor, and that there should be eight principal burgesses and eight assistants (as before) who should altogether (exclusive of the one principal burgess who should be mayor) be a common council to assist the mayor, and that the common council, or the major part, assembled on public summons, together with the mayor, should have power to make by-laws for the good discipline and government of the town and borough, and of the officers, ministers, artificers, inhabitants, and residents, and for declaration in what manner and order the mayor, principal burgesses and assistants, and all and singular officers, ministers, &c. should conduct themselves in their offices, functions, trades and affairs, for the further public good, common advantage, and good government of the town and borough, and victualling the same, and all *other matters and things* whatsoever touching or in any wise concerning the town or borough. The charter then appointed the election of mayor to be in the manner before described: and then set forth that no *stranger* or foreigner, *unless he be a freeman* of the town and borough, should sell or expose wares to sale in the borough other than victuals. The same charter also contained a confirmation of all former liberties, privileges, customs, &c. as were lawfully used or enjoyed
 by

by any name of incorporation, and then required the oaths of supremacy and allegiance to be taken by all officers and ministers, and that *every person* thenceforward to be admitted to the freedom of the town and borough should previously take such oaths before the mayor. The plea then stated the acceptance of that charter, and that the corporation still continued by the same name, &c. It then set forth, that from time immemorial there has been an ancient custom there used that the burgesses, or the major part of them, under their various names of incorporation aforesaid, from time immemorial until the granting and acceptance of the charter of *James 1.* were used and accustomed to admit and swear, and the said mayor and common council in common council assembled, or the major part of them, after the granting and acceptance of the said charter and until the surrender thereof and inrollment, &c. were used and accustomed to admit, and the said last-mentioned mayor to swear; and from and after such surrender, &c. until the granting and acceptance of the charter of *Car. 2.* the burgesses of the said town and borough under their then name of incorporation, or the major part of them, were used and accustomed to admit and swear, and from the granting and acceptance of the said charter of *Car. 2.* the said mayor and common council in common council assembled have used and been accustomed to admit, and the said last-mentioned mayor hath sworn; and the said burgesses, or the major part of them, under their various names of incorporation during all that time until the granting and acceptance of the said charter of *Ja. 1.* *ought to have* admitted and sworn, (and so on through the same changes as before,) and the mayor and common council so assembled as aforesaid, or the major part of them still of right ought to admit, and the said last-mentioned mayor to swear, as a freeman or freemen of the said borough, such fit and proper person or persons having attained the age of 21 years, as to them, &c. (respectively as before) should seem meet; and that every person so admitted and sworn a freeman, have exercised, &c. the said office. The plea then set forth an election of the defendant to be a freeman according to such custom; that he was of age, and took the oaths, &c. and still is a freeman, &c. To this there was a general demurrer and joinder.

Dampier in support of the demurrer having opened the pleadings;

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make freemen.

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Lord KENYON, C. J. said, I observe that the plea states that *Okehampton* is a borough by prescription as well as by the charters of *James 1st* and *Car. 2d*, and it prescribes for a power to make honorary freemen vested in the whole body. To that I see no objection: but then it concludes by claiming the same power to be exercised by a part only or select body of the existing corporation; and this without shewing any charter granting to them such a power, or even without shewing any by-law to that effect. Not that I am prepared to say that such a by-law, if it had existed, would have been sufficient to have transferred the power from the body at large to a select part of it: but as it stands on the plea even without a by-law for that purpose, a part of the corporation have, there is no saying how, assumed to themselves a power which belonged to the whole body. This is impossible to be supported at any rate.

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Burrough for the defendant admitted that the plea could not be supported unless he could make out, which he would endeavour to do, that the body now exercising the right of admitting freemen was in effect the whole corporation, as representing them for this purpose.

Lord KENYON, C. J. That is impossible to be sustained when it is expressly stated to be only a part of the corporation.

Per Curiam,

Judgment for the Crown.

Saturday,
Nov. 21st.

The KING against CLARKE.

Upon an information in nature of quo warranto against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing

A N information in nature of quo warranto was exhibited against the defendant, calling upon him to shew by what authority he claimed and exercised the office of alderman of the town of *East Retford*, in the county of *Nottingham*. The defendant by his plea shewed, that before and at the time of granting the charter after-mentioned *East Retford* was a corporation by prescription, by the name of the bailiffs and burgesses of the town of *East Retford*. That *James 1st* by his charter, (8 *Jac. 1.*) granted them to be a corporation by the same name; having two

to a second information for exercising the same office that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus from this Court. But semble if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment *quousque*, &c.

chief

chief magistrates, a senior and a junior bailiff, and twelve burgesses to be called aldermen. That the two first nominated bailiffs, and the burgesses at large should meet and choose the twelve first aldermen, who should be sworn, and execute their offices for life, unless before removed for reasonable cause, and that the aldermen should be the common council to assist the bailiffs. That on the first *Monday* in *August* of every year, the bailiffs and burgesses, or the major part, should chuse one of the aldermen to be senior bailiff, who should be sworn, and should execute the office for a year, and till another was chosen. And that on the same day the bailiffs and aldermen, or the major part, should nominate two burgesses, of whom the bailiffs, aldermen, and burgesses, or major part, should chuse one to be junior bailiff, who should be sworn and execute his office for the same period. It also made provision for another election in case of the death of either of the burgesses within the year. That on the death or amotion of an alderman, the bailiffs and residue of the aldermen, or major part, should nominate two burgesses, of whom the bailiffs, aldermen, and burgesses should chuse one to be alderman of common council, and that he so as aforesaid to the office of alderman, &c. elected and appointed, and sworn before the bailiffs of the town on his oath, the office of alderman, &c. well and faithfully to execute, should be of the number of twelve aldermen of common council, &c. It then stated the acceptance of the charter; and that on the 25th *March* 1795, *W. M.* an alderman died. That on the 31st *July* 1795 the bailiffs and residue of the aldermen met, and nominated the defendant, *Clarke*, and one *Barker*, who were burgesses, as candidates for the vacancy, and that the bailiffs, aldermen, and burgesses, did *choose, name, and appoint* the defendant to be an alderman: and that on the 23d *November* 1796 the defendant was in due manner sworn before the two bailiffs; by reason wherof he claimed, &c.

The replication, after taking issue on the grant and acceptance of the charter of *James* 1st, and on the choice, nomination and appointment of the defendant to be alderman, further pleaded, that after the supposed choice, nomination and appointment of the defendant to be alderman, and before his swearing in, and before the exhibiting of this information, i. e. in *Hilary* Term 1796, an information was filed against the defendant for *using and exercising* the office of one of the aldermen of *East Retford*, for a certain time in the said information mentioned,

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against
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Replication.

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Prior information against defendant for using said office.

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against
CLARKE.
Taliter pro-
cessum.
Disclaimer.

Judgment
of ouster.

No appoint-
ment, &c.
since.

tioned, without legal warrant, and prayed that due process of law might be awarded against him in that behalf, to make him answer and shew by what authority he claimed, &c. That such proceedings were thereupon had, that in *Easter Term* 1796, the defendant did disclaim the said office, liberties, privileges, and franchises in the said information specified, and did not deny but that he had usurped the said office, &c. during all the time alleged: &c. whereupon by the said Court, &c. it was adjudged that the defendant should not intermeddle with, &c. the said office, liberties, &c.; but be *absolutely forejudged and excluded from ever exercising or using the same or any of them for the future*. It then set forth the capiatum and award of costs to the relator, &c. It then averred that the defendant was never chosen, nominated or appointed to the office of an alderman, since the rendition of the said judgment. There was a second replication, the same as the former, only stating that after the nomination, and before the exhibiting of this information, the former information was exhibited, &c. omitting the mention of the swearing in.

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Rejoinder, that after the defendant was so chosen, nominated and appointed to be alderman, and after the rendition of the judgment in the plea mentioned, and before the defendant was sworn in, to wit, in *Michaelmas Term* 1796, a peremptory mandamus issued out of this Court, at the prayer of the defendant, to the bailiffs of *East Retford*, (reciting his nomination, &c.) to swear him into the office of alderman, in obedience to which writ he was accordingly duly sworn in before the bailiffs. The like rejoinder to the second replication. To both which there was a general demurrer on the part of the crown.

Dampier in support of the demurrer. The question is, Whether an absolute judgment of ouster between the election to an office and the swearing in is not a total exclusion of the party from the office; so that no right can be acquired therein without a new election. Nothing can be stronger than the terms of the disclaimer and judgment, by which latter the defendant is *absolutely forejudged and excluded from ever exercising or using the office for the future*. After such a judgment no latent right can remain upon which the swearing in can operate. Unless the issuing the mandamus to swear him in can make any difference, the point has been expressly decided in *R. v. Pender (a)* where

(a) Cited in *R. v. Rocks*, 2 *Ld. Ray.* 1447.

to an information for exercising the office of mayor of *Penryn*, the defendant pleaded his election and swearing in: and on the trial the jury having found his election, but not the swearing in, judgment of ouster was given against him, which was affirmed upon error brought in *Dom. Proc.* In the reasons (a) there given for reversing the judgment, it is insisted that that part of the judgment which excluded him from the office was erroneous, because his right to it was established by the finding that he was duly elected: and yet that whilst the judgment of ouster stood, the plaintiff (in error) *could not have the effect of a mandamus from B. R. to be sworn into the office, though the legality of his election was not disputed.* On the other hand, the legality of the judgment was defended upon the stat. 9 *Ann. c. 20.* And that it being expressly required by the charter, that the oath of office should be taken before the party were admitted to execute the office, the justification being entire was destroyed by the finding that he was not duly sworn, and consequently the judgment of ouster was the only legal judgment adapted to the case. The result of this reasoning goes to shew, that if the whole matter had been brought in discussion before the Court, they would not have granted the peremptory mandamus in this case. And as the then bailiffs might have acted in collusion with the defendant in not resisting the mandamus, that ought not to influence the present decision; for it is no more in effect than if the bailiffs had sworn him in without a mandamus. This very point was decided in the case of *R. v. Hearle (b)*, upon an application by *Pender* himself for a mandamus to swear him into the office to which he had been elected; which was refused by the Court in consequence of the judgment of ouster, which, as the Chief Justice said, did away the election: though, as *Reynolds, J.* said, there ought properly to have been a judgment of ouster *quousque* only, upon the finding of the jury on the former information. Then, if the mandamus issued improperly in this case, it cannot vary the question, being supersedeable like all other writs issued by the Court. If, notwithstanding the absolute judgment of ouster against the defendant, there were any latent right to the office remaining in him, the Court did wrong in refusing the mandamus in *Hearle's* case; for the only effect of the writ is so far to put the party in possession of the office in fact, as to enable him to try his right to it; but a mandamus confers no title

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(c) 5 *Bro. P. C.* 173. 7.(b) 1 *Str.* 625.

1801. in itself. *Basset v. the Mayor of Barnstable* (a); *R. v. Dean and Chapter of Dublin** (b), and *R. v. Ward* (c). Then how can the award of a writ of mandamus, on which no error lies, do away the effect of a judgment unreversed? The case of *The King v. Pender* was much stronger than the present, because there the election was found to be good, and the judgment of ouster proceeded wholly upon the insufficiency of the swearing in; but it does not appear here on what the disclaimer or the judgment was founded; it might have been as well upon a surrender or amotion or forfeiture, as upon the insufficiency of the swearing in. When questioned by the king as to his claim and user of the office, he admitted that he had no claim or right to exercise it: then he is estopped from afterwards insisting that he had any title at that time. Great inconvenience would ensue from such a temporary secession, and subsequent resumption of an office. The vacancy may be filled up in the mean time. Within what interval may the office be resumed? Will the title refer back to the election? If so, a secession by disclaimer on an information in nature of quo warranto, and a subsequent swearing in, will make a bad title indefeasible. It is, therefore, more consonant to principle as well as to authority to say, that the title being entire, the judgment of ouster, though grounded on a defect in part, vitiated and did away the whole; and therefore that the defendant can only protect his title by shewing a new and legal election and swearing in subsequent to that judgment.

[81] *Vates*, contra. It is not contended that the mandamus to swear in the defendant could of itself confer any right to the office; but his title arises on the prior nomination and election, which were regular and legal: but without a due swearing in the defendant was not authorized to exercise the office, and therefore he disclaimed, not the legality of the election; for that was the franchise of the electors, and not his own; but the right to use the office, not having been properly sworn in. It was not competent to the defendant to disclaim the right which the electors had of appointing him to the office of alderman; if that were so, any man might contrive to evade the holding of a burthensome office in a corporation by getting a friendly information to be filed against him, and thereupon disclaiming. Admitting that the title is entire, if any part of it be different from

(a) 1 Sid. 236.

(b) 1 Stra. 543.

(c) 2 Stra. 896.

that before set up, and upon which the judgment of ouster was given, that judgment is not conclusive. A judgment is only conclusive on that which was in controversy before (a). Now here the title set up is different in part, and being entire, is therefore different in toto, from that before judged: for it appears to be founded on a swearing in after the prior judgment. In *R. v. Hearle* (b), the Chief Justice gave no reason for the conclusiveness of the judgment, but the mere form of it: and the only decision of the House of Lords (c) on that case was, that no writ of error lay upon the award of a peremptory mandamus. That case therefore concludes nothing as to the principal question. The case of *The King v. Pender*, referred to in the book cited (d) is reported in *Strange* (e) by the name of the mayor of *Perryn's* case. And there the Court say, that the acting without being sworn was certainly an usurpation, for which they were bound to pronounce judgment against him upon that record. But so far from considering that the judgment of ouster concluded him from insisting upon the prior good election, they said that if it were not too late he might have a mandamus to swear him in; though they must punish him for his usurpation hitherto. In the mayor, &c. of *Colchester v. Seaber* (f), after judgment of ouster against all the corporators, yet it was holden that the prescriptive rights of the old corporation might be revived by a new charter to the same body. [Lord *Kenyon*, C. J. That case did not pass without much doubt at the time. The justice of the case helped to get over difficulties in it.—*Lawrence*, J. It was much questioned in *R. v. Pasmore* (g), and *R. v. Bellringer* (h).] At any rate, the Court in the case of *R. v. Biddle* (i), which was subsequent to the mayor of *Perryn's* case, disapproved of that judgment; for an usurpation being confessed as to part of the time charged in the information, for which time the prosecutor had entered judgment of ouster, the Court, upon motion, ordered it to be expunged, except as to the capiatum pro fine; as they said it would be hard that a good election should be thus done away: and they distinguished it from *Pender's* case, where he was guilty of an usurpation during all the time charged in the information. So here this was a mere tem-

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(a) *Seddon v. Tutop*, 6 Term Rep. 607.

(b) 1 Stra. 627.

(c) 3 Bro. P. C. 178.

(d) 2 Ld. Ray. 1447.

(e) 1 Stra. 582, S. C. 8 Mod. 254.

(f) 5 Burr. 1866.

(g) 3 Term Rep. 129.

(h) 4 Term Rep. 810.

(i) 2 Stra. 252.

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porary usurpation. Though a mandamus to swear in an officer would not of itself confer a title upon him to the office, yet it is not altogether nugatory. At least it imports an acknowledgment by the judgment of the Court of an antecedent title in the party: and it having been granted in this case immediately subsequent to the disclaimer and judgment of ouster upon an affidavit of the prior election, shews that such judgment was not considered as absolutely conclusive against the validity of the election. If a mandamus operated nothing as to the title, it would be nugatory to make a return, or to traverse such return: for the title might as well be tried at any subsequent time. But it is considered of so much consequence, that in an action for a false return, the Court will not suffer the propriety of issuing the writ to be questioned (*a*). The defendant's title ought to have been disputed, if at all, upon the application for the mandamus. And in *R. v. Turner* (*b*) the Court refused, even at the prayer of the attorney-general, to grant a mandamus to swear one in as mayor, after a peremptory mandamus before granted to swear another into the same office.

Lord KENYON, C. J. The question is abundantly clear of all doubt. *The King v. Hearle* has confirmed my first impressions on reading this case. It is the language of all the cases that a mandamus to swear in confers no title. It is the consummation of the party's title, if he have one, but it gives him none. It is frequently granted merely to enable a party to try his title. What is this case? Upon an information exhibited against the defendant for usurping the office of alderman of *East Retford*, he was so conscious of not having any defence, that he disclaimed, not on any particular ground, but generally; thereby admitting his usurpation; upon which there was judgment of ouster against him, whereby he was absolutely forejudged and excluded from ever using the office in future. If this were not to conclude him from insisting upon the same election again, I know not what would. Suppose after this an application had been made to the Court for a mandamus to compel the corporation to proceed to a new election to fill up the vacancy, what resistance could have been made to it? and yet if the prior election could be resorted to again, it could be of no

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(*a*) *Green v. Pope*, 1 *Ld. Ray.* 126.

(*b*) *T. Jones*, 215. *sed vide R. v. Harris*, 3 *Burr.* 1422.

avail; or there might be two persons filling one office at the same time. If the defendant could insist on the former election, he would also be entitled to a mandamus to swear him in: and thus the proceedings of the Court would become utterly inconsistent. It was for that reason the Court refused the application for a mandamus in *Turner's* case. I do not meddle with the question whether the judgment here on the former information might have been entered in a different way. I do not say what the effect would have been if the judgment had been prayed to be entered up only for the *capiatur pro fine* for the time during which the defendant usurped by acting in the office before he was duly sworn in. The Court, no doubt, on such an application, would have done what justice required. Perhaps it might have been thought that a judgment *quousque* only would have answered the purpose until the title were consummated by a proper swearing in. The case of *The King v. Biddle* turned on this very distinction. But if this attempt would serve, there is a good receipt, as was properly observed, for making a bad title good, by a swearing in at the end of six years after a judgment of ouster. There ought to be an end of controversy after a judgment upon the matter. Is it not the same in real actions; if the party fail in his action he is bound for ever. Here is an absolute judgment of ouster, and without any attempt to reverse it for error, or by shewing fraud, it is endeavoured in this manner to render it of no avail. That cannot be permitted. Therefore both on authorities, reason, and analogy, I think the demurrer is well founded.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J. As to the mandamus giving any title, it has long been considered otherwise. And not long ago, in the case of *The King v. the Burgesses of Truro*, 35 Geo. 3. an application for a mandamus to swear one in as mayor, was resisted on an objection to the legality of the election; but the answer given was, that the defendants might return the special matter, so as to enable the party to try the validity of his election. But no idea was entertained that the mandamus conferred any title upon him.

LE BLANC, J. of the same opinion.

Judgment of ouster.

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1801.

Saturday,
Nov. 21st.

Ex parte MAXWELL.

An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And seems that an annuity paid without objection for more than six years shall be protected by analogy to the statute of limitation against any such objection dehors the memorial, without strong reasons to the contrary.

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A Rule was granted, calling on the executors of *John Broomhead*, deceased, to shew cause why the bond warrant of attorney and indenture given to secure an annuity should not be delivered up to be cancelled, and why the annuity thereby granted should not be set aside. This was founded upon an affidavit of *William Maxwell*, setting forth the memorial of the annuity of 20*l.* during the life of *Maxwell*, secured on the said instruments out of certain trust money, for which the consideration was stated to be 140*l.* paid in hand by *Broomhead* to *Maxwell*, in manner mentioned in the indenture for securing the same: which indenture, dated 21st * *August* 1790, and the receipt of the money, was witnessed by *R. M.* servant to *Broomhead*. The affidavit also set forth the manner in which the consideration money was paid, viz. 50*l.* in bank-notes, 69*l.* 10*s.* by a banker's draft, dated the same 21st of *August* and paid that day; and that the remaining 20*l.* 10*s.* was at the same time retained by *Broomhead* for the costs and charges of preparing the securities.

Dampier shewed cause upon an affidavit made by *J. Broomhead*, the son of the deceased *J. Broomhead*, stating that his father died in *January* 1794, and that the annuity was regularly paid to him in his lifetime, and since his death to the deponent as his acting executor until *June* 1800, without objection on the part of the grantor. That at the time of the sale of the annuity and for three years afterwards, the deponent was living apart from his father, as clerk to another person, and was not present at or privy to the transaction. That the other executors of his father never acted, and were also unacquainted with what passed at the time of the purchase of the annuity. He relied on these circumstances to shew that the Court would not interfere to set aside the annuity after the grantor had lain by so long, and till after the death of the grantee, who alone could give any account of the transaction to those concerned on his behalf; for the witness to the deeds, though still living, was merely a servant, and knew nothing of the transaction. And he cited *Poole v. Cabanes* (a), where the

Court objected to granting a similar application, because the grantor had paid the annuity till after the death of the person by whom it had been negotiated on the part of the grantee, and who alone could have answered the objections raised on the part of the grantor.

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Garrow and *Wigley* in support of the rule (being desired to confine themselves to answer this objection) said, that this was distinguishable from what was thrown out by the Court in the former case, inasmuch as the witness was still alive, who might have explained what passed at the time the instruments were executed; and ultimately the annuity there was set aside for a defect appearing on the face of the memorial. That if the payment of an annuity for a few years were holden to conclude the grantor from shewing a defect of consideration, it would tend greatly to impede the beneficial operation of the Annuity Act (*a*), as distressed persons were not often in a condition to right themselves soon after they had made improvident bargains, in which undue advantage had been taken of them.

Lord KENYON, C. J. I feel no difficulty in disposing of this case. During the life of the grantee no objection was taken to the annuity, and the interest was regularly paid; and this has been continued to be done for near seven years since his death, down to the middle of the year 1800. And now for the first time it is attempted to rip up the whole transaction for a supposed defalcation in the payment of the consideration money. I know not where such a mischief is to stop if this could be permitted. This may be the only provision made for the younger branches of a family. The legislature, for the safeguard of the subject in their personal dealings with each other, have thought it wise to pass a statute of limitation (*b*) to personal actions. I know not why that should be disregarded in this more than in other instances. It is a circumstance deserving of weight, that more than the period fixed by that statute, which affects personal property, has run out, without any attempt to impeach this transaction; and I think we should be doing great mischief if we were to give way to this application.

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Per Curiam,

Rule discharged.

(*a*) 17 Geo. 3. c. 26.

(*b*) 21 Jac. 1. c. 16. s. 3.

1801.

Monday,
*Nov. 23d.*PENTON *against* ROBERT.

To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest. Held that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired.

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TRESPASS for breaking and entering a certain yard and divers buildings, &c. of the plaintiff at *Battlebridge* in the county of *Middlesex*, and there without the leave and licence of the plaintiff breaking down and pulling to pieces the said buildings, &c. and the materials of a certain fence belonging to the said yard, and for taking away certain timbers, bricks, lead, &c. and disposing thereof to the defendant's use. As to the breaking and entering the yard, the defendant suffered judgment by default, and as to the rest of the trespasses, pleaded the general issue. At the trial before Lord *Kenyon*, C. J. at *Westminster*, it appeared that certain land, including the spot in question, had been let for a term by the plaintiff to one *Gray*, whose executors had let off part to one *Cotterell*, under whom the defendant was in possession as an under-tenant; having had permission from *Cotterell* to erect a building thereon for the purpose of making varnish. This building had a brick foundation let into the ground, with a chimney belonging to it, upon which a superstructure of wood, brought from another place where the defendant had carried on his business, was raised, in which the *defendant carried on his trade. The original term expired at *Michaelmas* 1800, in consequence of a proper notice to quit given by the plaintiff to the executors of *Gray*: (and it was admitted that the plaintiff had recovered judgment in ejectment against this defendant for these very premises; though that fact was not proved at the trial). But the defendant remained in possession for some time afterwards, and was in fact in the possession of the premises at the time when he pulled down the wooden superstructure, and carried away the materials, which was the subject of the present action. A verdict was taken for the plaintiff, subject to the question, whether the defendant were warranted in pulling down the building, and taking away the materials, after the expiration of the term. And a rule nisi having been obtained on a former day for entering a verdict for the defendant as to all but the trespass confessed of breaking and entering the yard.

Mingay and *Reader* shewed cause against the rule. Admitting that by the latitude which modern determinations had given

given to tenants to remove certain fixtures annexed to the freehold, for the purpose of carrying on trade, the defendant might, during the continuance of the term, have removed the building in question, still he had no right to do so after the term was expired; for in that case he is a trespasser by the very act of coming or continuing upon the property, which is indeed admitted by the defendant on the record; and the law cannot involve such a contradiction as to give a man a right, and yet make him a trespasser in the only act by which he can exercise it. (Lord *Kenyon* asked, whether if he had left any personal chattel on the premises, as a hogshead of wine, he would not have been entitled to it after the term?) There is a difference between mere personal chattels, the property of which remains in the owner till divested by some lawful act of his, and things which are annexed to the freehold, which, generally speaking, vest in the landlord, by act of law. If a tenant were to leave marble chimney pieces, which he had erected during the term, he could not come at any time afterwards and take them away.—Lord *Hardwicke's* opinion is express to that point in *Ex parte Quincey (a)*. So in *Fitzherbert v. Shaw (b)*, though it was admitted that the defendant might have removed the erections of this kind he had made during his tenancy, yet it was ruled that he had no right so to do after the expiration of the term.

Garrow, *contra* was stopped by the Court.

LORD KENYON, C. J. The old cases upon this subject lean to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave every thing behind him which can be said to be annexed to it. Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of green-houses and hot-houses, &c. are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated.

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ROBART.

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(a) 1 *Atk.* 477.

(b) 1 *H. Blac.* 253.

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 PENTON
against
 ROBERT.

This is a description of property divided from the realty. And some of the cases have even gone further in favour of the executor of tenant for life against the remainder-man, between whom the rule has been holden stricter; for it has been determined that the executor of tenant for life was entitled to take away the fire engine of a colliery. The case of *Fitzherbert v. Shaw* turned upon the construction of an agreement that such things should be left on the premises, and decided nothing against the general principle. Here the defendant did no more than he had a right to do; he was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them.

LAWRENCE, J. It is admitted now that the defendant had a right to take these things away during the term: and all that he admits upon this record against himself, by suffering judgment to go by default as to the breaking and entering, is that he was a trespasser in coming upon the land, but not a trespasser *de bonis asportatis*; as to so much, therefore, he is entitled to judgment.

Per Curiam, Let a verdict be entered for the plaintiff as to the trespass in breaking and entering, damages 1s.; and for the defendant as to the rest of the trespass.

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 Monday,
 Nov. 23d.

HAYCRAFT *against* CREASY.

TO an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that such representation were made by the defendant *bonâ fide*, and with a belief of the truth of it; for the foundation of the action is fraud and deceit in the defendant and damage to the plaintiff by means thereof. And taking the assertion of *knowledge secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief founded on what appeared to the defendant to be reasonable and certain grounds,

the

the way of his trade: and thereupon just before the making of the false representations, &c. *J. H.* the younger, the son of the plaintiff, had on his behalf applied to the defendant to inquire of him as to the safety of giving credit to the said *Robertson*: yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, and to induce him to give credit to *Robertson*, falsely represented to the said *J. H.* the younger, “that the plaintiff would be perfectly safe in giving “credit to the said *Robertson*, as he (the defendant) *knew*, that “she (*Robertson*) was then in possession of considerable property by the death of her mother, and was in expectation of “a much greater by the death of her grandfather, who had “been bed-ridden a considerable time.” It also averred, that the defendant falsely represented to one *Joseph Haycraft*, who had applied to him on behalf of the plaintiff, in order to inquire whether the plaintiff might trust said *Robertson*; “That she “(*Robertson*) was a lady of great fortune, and much greater “expectations, and that he (the defendant) *knew* that the plaintiff might credit her (*Robertson*) to any amount with perfect “safety.” It also laid other expressions to the same effect, and particularly concerning *Robertson*’s relationship to certain persons of note. And then averred, that by means of the said several false representations of the defendant, the plaintiff confiding therein, gave credit to *Robertson*, for divers goods, &c. sold and delivered to her to the amount of 485*l.*: and then concluded, that in fact, at the time of the said several false representations it was not safe to give credit to *Robertson*, and that she was not in possession of considerable property, &c. nor in expectation of greater, &c. and so negating all the other representations of the defendant; (but not alleging that the defendant knew them to be false at the time,) on the contrary, that *Robertson* was then wholly unworthy of credit, and unfit to be trusted, &c. and that the said sum of 485*l.* was still due to the plaintiff, who, by means of the several premises, was likely to lose the same. There were other counts laying the representations in different ways.

At the trial before Lord *Kenyon*, C. J. at the Sittings at *Guildhall*, the transaction which led to the representations in question appeared in substance to be this. A Miss *Robertson*, (the person named in the declaration,) who had formerly been a teacher at a school, in which capacity the defendant had first be-

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come acquainted with her, having had children at that school, on a sudden, some little time before the transaction happened, gave herself out to the world as a person of considerable fortune, which had devolved upon her by her mother's death, and with still greater expectations from her grandfather and other relatives. Upon the strength of these assurances she contrived to obtain credit to a considerable amount from a number of persons, and settled herself in a large house at *Blackheath*, fitted up in an expensive manner, kept a carriage, exhibited a great shew of plate, and other marks of affluence, talked of her relationship to persons of note; by means of all which she imposed on great numbers of persons, who believed her to be the character she had assumed, and visited her as such. Amongst other things she pretended to be the owner of a considerable estate in *Scotland*, from the rents of which she had been kept out for about 40 years, but had then lately got into possession; and in support of these pretensions she exhibited supposed plans of the estate, with admeasurements of the woods, &c. and actually appointed a respectable man of business as her agent or steward, to receive the rents, &c. from whom she took bond to a large amount, as security for the faithful discharge of his functions. All these and other like appearances were proved to have been continually exhibited to the eyes of the defendant; who was a currier at *Greenwich*, near which Miss *Robertson* lived. And though some attempt was made by evidence to implicate him in the fraud that was going on, yet upon the result nothing of that sort was established against him; but it appeared that he himself had been duped by these appearances, and had actually lent her his acceptances to the amount of above 2000*l.* upon the strength of them; for which he had not taken any security at the time the representations were made; though some months after, and before the final exposure of the imposition, and the absconding of Miss *Robertson*, he had obtained of her a bond and warrant of attorney to secure his advances. The particular circumstances which led to the present action were these; about *May* or *June*, while Miss *Robertson* was fitting up her house at *Blackheath*, application was made on her behalf by the defendant to the plaintiff's son (who conducted the ironmongery business in his father's absence); the defendant stating that he had recommended Miss *Robertson* to come to the plaintiff for such articles as she might want in the

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way of his business. The plaintiff's son inquired as to her responsibility, she being an entire stranger to him and his father; to which the defendant answered, "Your father may credit her with perfect safety; for *I know of my own knowledge* that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bed-ridden a considerable time." The defendant afterwards came with Miss *Robertson* and her companion, (also known to the defendant for many years before as the keeper of the same school,) and they looked out and ordered articles to a large amount. The plaintiff's son swore at the trial that he dealt with them entirely on the defendant's information. Finding the order, however, to be so large, the son again asked the defendant, if he were certain as to the representation he had made; who again answered with the same certainty, and never expressed any doubt. The son thereupon wrote to the plaintiff, and in consequence of the answer he received applied to his uncle to see the defendant on the business. Upon this latter's application to the defendant for the same purpose, the defendant repeated his assertion that Miss *Robertson* was a person of great fortune and greater expectations, and was related to certain persons of rank whom he named; and added, "*I can positively assure you of my own knowledge*, that you may credit Miss *Robertson* to any amount with perfect safety." Various other assertions to the like effect were proved; but particularly on one occasion, after representations of this sort had been made to the plaintiff's brother, the latter said to the defendant, "I hope you do not inform me this upon bare hearsay; but do you know the fact yourself?" The defendant answered, "Friend *Haycraft*, *I know* that your brother may trust Miss *Robertson* with perfect safety, to any amount." The jury found a verdict for the plaintiff for 485*l*.

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A rule was obtained; calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground that there was no fraud or deceit in the defendant making the representation in question, though he had incautiously averred that to be within his own *knowledge*, which in strictness he could not be said to *know*, but only had reasonable and probable cause to believe, and did in fact believe to be true at the time: and that without fraud, the action was not maintainable though the representation turned out to be false.

Erskine,

1801. *Erskine, Garrow, Gibbs, and Lawes*, shewed cause against the rule. This action is bottomed upon the same principles which governed the cases of *Pasley v. Freeman* (a), and *Eyre v. Dunsford* (b); here is the *damnum* and *injuria* concurring; the deceit in the defendant, and the injury and loss to the plaintiff. The *sciens* is considered as equivalent to the *fraudulenter* (c). It was well said in those cases, that if one be applied to for information as to the credit of another, it is optional in him whether or not he will answer the inquiry; but that if he do, he is bound to answer truly. This is a case where the defendant not loosely or inadvertently, but after grave warning, deliberately asserted a fact of his own knowledge, which is averred and proved to have been false. It matters not to the plaintiff whether the defendant knew it to be false at the time; the injurious consequence is the same to him; nor is it less culpable in the defendant, whether he knew it to be false, or which is the same thing, did not know it to be true. If he asserted that of his knowledge which he did not know to be true, and that at least is proved by the event, the imposition upon the plaintiff is the same, and the law holds him responsible for the consequences. It is difficult, and sometimes impossible to trace the motives which induce such declarations; though there is no doubt that for the most part they proceed from some sinister motive or expectation of advantage to the party. And here it appeared that Miss *Robertson* was considerably indebted to the defendant himself at the time, as well as some other casual circumstances, which might induce a jury to account in this manner for the earnest anxiety which he shewed to establish the opinion of her credit in the world. But at any rate it was fully established in the cases referred to, that it was not necessary to the maintenance of the action, that the defendant should have any interest at the time in making the false representation; it is enough if it be false, and be made deliberately, and that the consequences are injurious to the plaintiff, who gave credit to it. Suppose a man imposed upon by a servant, out of pity to his apparent distress, were to give a character of him to another, and assert facts in his favour as of his own knowledge, which he no otherwise knew than by the declaration of the servant him-

(a) 3 Term Rep. 51.

(b) 1 East, 318.

(c) *Leakins v. Clissel*, 1 Sid. 146. 1 Keb. 522.

self; in consequence of which the other took him into his service, and was immediately robbed by him; and it turned out that the whole representation was false; but that the maker was actuated solely by mistaken motives of compassion to state that which he did not know to be true; upon what principle of justice could he excuse himself on account of such motives, for hazarding an assertion so injurious to another in its consequences? If one assert absolute knowledge of a fact, which he does not know, but has only reason to believe, he cannot but know that his assertion is false, whether the fact asserted turn out to be true or not. The case is much stronger against such an one when, as in this case, his attention is drawn at the time to the distinction between knowledge and mere hearsay: for however propitious appearances may be, a man may refuse to credit them without the actual knowledge of the party to whom he applies for information. It can be no defence, therefore, that the defendant was himself duped, or that he *believed* that the vendee was a person of the credit he represented her to be, or even that he had reasonable grounds for such belief; for his representation went further than this, and unless it had, it is probable the credit would not have been given. There is no foundation for the objection that this is an attempt to evade the statute of frauds; for that was only meant to indemnify persons from collateral undertakings for the debts of others, where no fraud had been practised to induce the credit: and at any rate, that objection would equally have applied to the cases of *Pasley v. Freeman*, and *Eyre v. Dunsford*, where it was made and over-ruled.

The Attorney-General, Dallas, Marryatt, and Comyn, contra. It was not attempted to go to the jury on the question of fraud; but it was insisted that the defendant had too credulously believed the appearance of credit assumed by Miss *Robertson*, and that he had exceeded his duty in stating his *knowledge* of that which he only *believed*, without knowing it to be true: and on this ground the case was left to the jury to find for the plaintiff. The question then is, Whether the averment of knowledge concerning a matter like credit, of which perfect mathematical knowledge cannot be predicated, and which at most can never amount to more than a high state of belief, makes the party liable for the consequences to another trusting to such a representation? All the cases upon this subject were fully investigated

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in *Pasley v. Freeman*: and *Grose, J.*, there said (*a*), that he had met with no case of an action upon a false affirmation, except against a party to a contract; and it may fairly be assumed, that previous to that determination there was no such case to be found; for *Buller, J.*, who entered largely into the authorities in support of the contrary opinion, did not produce any direct authority in support of it. All the cases mentioned by him were cases of fraudulent assertions by one of the contracting parties. What is said in *Risney v. Selby* (*b*), as to the tenant's falsely affirming to a purchaser that the rent was higher than it really was, amounts to no more than this, that the rent being a matter lying within the knowledge of the landlord and tenant, if *they* (i. e. the landlord and tenant) were parties to the contract of sale, the action would lie against them. But it is not said that the action would lie against the tenant alone, falsely affirming as to the value of the landlord's estate, if he were no party to the contract between the landlord and the purchaser. But without impeaching directly the judgment delivered in *Pasley v. Freeman*, concerning which, however, much doubt has been entertained, it is sufficient to observe, that all the cases hitherto have proceeded on the ground of an intended deception by making the false representation, and many of them with a view to the person's own benefit who made it. In *Pasley v. Freeman*, though there was no benefit to the defendant, yet the judgment went expressly on the ground of fraud. *Buller, J.* said throughout, that the foundation of the action is *fraud* and *deceit*: and relied mainly on the fact, that the defendant knew the representation to be false. And he cited Mr. Justice *Twisden's* opinion in *Leakins v. Clissel* (*c*), with approbation, that fraud must be proved to maintain the action. The new trial in *Eyre v. Dunsford* (*d*) was refused on the ground that there was sufficient evidence for the jury to find fraud, inasmuch as the defendant could not but know that the representation made by him was false. But there is no case which holds a defendant liable for incorrectly, perhaps, asserting a positive knowledge of that which he believed to be so, and had a moral probability for so believing: and here he vouched the genuineness of his belief, by having credited Miss *Robertson* himself to

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(*a*) 3 Term Rep. 53.

(*b*) Salk. 211.

(*c*) 1 Sid. 146.

(*d*) 1 East, 313.

a considerable amount at the time; for which he took no security till several months afterwards. Then consider what the word *knowledge*, as applied to the subject-matter, meant: it could only mean, that the defendant had such strong grounds for believing the fact, as that he himself would for every purpose act upon it as true. If a man could not predicate knowledge of another's wealth, upon such circumstances of reasonable presumption as offered themselves to the defendant's mind, he could upon none: no degree of general credit or visible property would warrant it: the credit might be delusive; the party might owe much more; and the visible property might be mortgaged beyond the value. The principle of this action goes to an indefinite extent, if a person were bound, at the peril of answering in damages, to answer truly every question put to him, and that no belief even would excuse the falsehood. Suppose from error in a man's watch he tells another, who is subpœnaed as a witness in a cause, that he knows it is eight when it is nine o'clock, in consequence of which, the witness, neglecting to appear in time, is called upon his subpœna, and has the costs of the cause to pay upon an attachment; would he have this remedy to recover damages? Where is the line to be drawn? Besides, this case trenches strongly upon the statute of frauds. If a particular phrase will have the operation and effect of making a man liable for the debt or miscarriage of another, it militates as strongly against the meaning and spirit of that Act, as if he had used words of direct guarantee or collateral undertaking. The statute was intended to guard against perjuries. If a mere shift of expression will take the case out of the statute, then persons will be made liable for the debts of others by proving that the defendant used the words "I know him to be worthy of credit," instead of "I will warrant or engage for his credit," or, "I will pay if he do not." And thus all the mischief will be let in which the statute was meant to prevent; namely, the making men liable to collateral responsibility for others by mere words without writing. The form of words cannot be material; the substance and thing is prohibited. At any rate, however, there was no fraud or deceit here, and therefore the defendant is entitled to a new trial.

Lord KENYON, C. J. If there be any doubt in this case, I should wish to have it put in such a shape as to be carried to the dernier resort. But not knowing how that can be done, I shall

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deliver the opinion which at present I entertain upon the case. Here is a *tradesman who has suffered a loss to a large amount in consequence of his having been induced to give credit to a third person: and by this action he calls on the defendant through whose misrepresentation the loss was incurred to make it good. The plaintiff's son knowing nothing at the time of Miss *Robertson*, who had been recommended to the plaintiff by the defendant to buy goods of him in the way of his trade, makes the most particular inquiries concerning her credit, to all which the defendant answers on several occasions in the most positive terms, that she was a trust-worthy person to his own knowledge. The plaintiff's brother, not satisfied with this, puts the question expressly to the defendant, whether he stated this upon hearsay or of his own knowledge, drawing his attention therefore to the subject in the most particular manner; to which the defendant again replies, "*I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety.*" The question then is, Whether that representation were true or false? No doubt it was a gross falsity. She was not a person to be credited with safety, nor had he any knowledge that she was so: and it is a juggle to say that the words in common parlance do not import knowledge in the strict sense of it. They were so understood between the parties at the time, and the plaintiff has suffered a loss in consequence of it. Soon after I came into this Court the case of *Pasley v. Freeman* occurred. I had the assistance of three very able Judges to help me to form my judgment; two of whom had long sat on the bench, and were peculiarly conversant with the forms of actions, and they were decidedly of opinion that the action lay; though we had the misfortune to differ from the other Judge, with whom I have now the honour to sit on the bench. I indeed was not then so well versed in the critical form of actions; but I had endeavoured to store my mind with established principles; and I had learned that laws were never so well directed as when they were made to enforce religious, moral, and social duties between man and man; and I knew that it was repugnant to all such duties for one man to make false representations to another to induce him to take measures which were injurious to him. That case has been acted upon ever since, and has recently been recognized by another decision of this Court, in which the two Judges who have

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since taken their seats on the bench concurred. I am not able to distinguish this case from those upon principle. The question has nothing to do with the statute of frauds. That was meant to guard against certain legal presumptions of fraud arising out of contracts, but not to indemnify persons against tortious acts and misrepresentations whereby others are deceived and injured. For a series of years since *Pasley v. Freeman*, cases of this sort have occurred which have passed without dispute. And I have been led to depend on that decision acquiesced in so long, and as I conceived no longer disputed by the learned Judge who differed at first from the rest of the Court. It is said, that I imputed no fraud to this defendant at the trial. It is true that I used no hard words, because the case did not call for them. It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. There are it is true some duties of imperfect obligation as they are called, the breach or neglect of which will not subject a party to an action. If I know that one in whose welfare I am interested is about to marry a person of infamous character, or to enter into commercial dealings with an insolvent, it is my duty to warn him; but no action lies if I omit it: but if any one become an actor in deceiving another; if he lead him by any misrepresentations to do acts which are injurious to him; I learn from all religious, moral, and social duties that such an action will lie against him to answer in damages for his acts. And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this Court on the same subject. His Lordship afterwards added, that as to the want of criminal intention in the party making the false representation, he had learned from Lord *Bacon's* maxims that there was a distinction in that respect between answering civiliter et criminaliter for acts injurious to others: in the latter case the maxim applied, *actus non*

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1801. non facit reum nisi mens sit rea: but it was otherwise in civil actions, where the intent was immaterial if the act done were injurious to another.
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CREASY. **GROSE, J.** I do not understand the question to be, whether this kind of action be maintainable: on that subject, although I still profess myself unable to comprehend the ground on which the case of *Pasley v. Freeman* was decided, yet I hold myself bound by the authority of it, so long as it remains unimpeached by any contrary decision. But I take the question here to be,
- [105] Whether the evidence prove that which is necessary to sustain the action? which, so far as I understood the arguments and opinion of the Court in *Pasley v. Freeman*, was said to be founded in fraud. It was there expressly declared in so many words, that fraud or deceit was the foundation of the action. The only question then is, Whether there were such evidence of fraud in this case as will sustain the action? Now I know not where to find any fraud in the transaction between these parties, I consider what was said by the defendant upon the several occasions, as no more than asserting his opinion of the credit of Miss *Robertson*; an opinion which he seems to have fairly entertained. It is true, that he asserted his own knowledge upon the subject: but consider what the subject-matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had had of forming such an opinion and belief. There is no reason for us to suppose that at the time of making those declarations he meant to tell a lie and mislead the plaintiff. He himself had trusted her before to a considerable amount. He had no reason to know otherwise than what he expressed: and had on the contrary reasonable grounds for asserting knowledge in the sense I understand him to have used it. He had for some time before seen many other persons treat Miss *Robertson* as a person of fortune. He himself saw her living in affluence. He had seen plans of her supposed estate in *Scotland*: and had observed other circumstances, altogether well calculated to delude him. I cannot say that I should not also have been duped by the same appearances. Then it is also a circumstance in the case, that he does not appear to have had any interest in misrepresenting the matter to the plaintiff otherwise than as it really appeared to him,
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him. And taking the whole together, I think the evidence goes no further than his asserting, that to his firm belief and conviction she was deserving of credit; and that the defendant was himself a dupe to appearances. But until some case shall be decided which goes further than that of *Pasley v. Freeman*, there must be evidence of fraud to support such an action: and evidence of being a dupe is not sufficient. Therefore, without meddling with the law as laid down in that case, but taking it at present to be right until it is overturned, I cannot concur in this verdict, there being no evidence of fraud as required by that determination.

LAWRENCE, J. Considering the great extent of this question, I wish that it may be put upon the record, in order that it may be submitted to the judgment of a higher Court. I have always understood the doctrine laid down in *Pasley v. Freeman* to be, that without fraud there was no cause of action. I collect that from the opinion delivered by each of the Judges who concurred in that judgment. If this case had gone to the jury on the ground of fraud, I cannot say there would have been no evidence to support the verdict: but the case went to them on the ground, that though the defendant were himself a dupe, yet if the representation made by him were false, he was answerable. Then the question is, Whether if a person assert that he knows such an one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation? It does not appear that any of the Judges went this length in *Pasley v. Freeman*. Stress has been laid on the defendant's assertion of his own knowledge of the matter: but persons in general are in the habit of speaking in this manner without understanding *knowledge* in the strict sense of the word in which a lawyer would use it. This observation will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he *knows* there is no city larger than *London*, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another. In order to support the action, the representation must be made *malò animo*. It is not necessary that the party should gain, or intend to gain any

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any thing for himself by it; but if he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake. However, in deference to the opinion from which I differ, I cannot but state this with doubt and distrust of my own opinion.

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LE BLANC, I concur with my brothers in wishing to have this question put on the record : but shall give the opinion which I now entertain. The question is, Whether the action be maintainable on a mere representation by the defendant that he knew that of his own knowledge, which in fact he could only be said to know according to the best of his information and belief? Now the law as laid down in *Pasley v. Freeman* went no further than this, that where a party with a design to injure another makes a false representation of a matter inquired of him, in consequence of which the other is damnified, he shall answer in damages.—The case of *Eyre v. Dunsford* followed on the same ground.—The former case came on upon a motion in arrest of judgment on the third count. That count stated, that the defendant *intending to deceive and defraud* the plaintiffs, did *wrongfully and deceitfully* encourage and persuade them to sell and deliver certain goods to one *Falch* upon credit; and for that purpose did *fulsely, deceitfully, and fraudulently* assert that *Falch* was a person safely to be trusted, &c. whereas in truth *Falch* was not then and there a person safely to be trusted, *and the defendant well knew the same*, &c. The question there was, Whether, admitting all those facts to be true, the action were maintainable? All the Judges who were of opinion in the affirmative, thought that there should be damage to the plaintiff, and fraud in the defendant. By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial. Then the question here is, Whether the defendant's saying that which critically and accurately speaking was not true, but not having said it with any intention to deceive, brings this case within the doctrine of *Pasley v. Freeman*? I think not. Then considering that case to have governed the determination in *Eyre v. Dunsford*, I understand the judgment in the latter to have turned on the fact that the party making the representation, which was not true, was himself to gain something by it; and that the jury were satisfied that the representation was false; and there was sufficient

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sufficient evidence to warrant them in drawing the conclusion that the representation was also fraudulently made. But this is a case where the defendant giving credit to the arts which had been practised upon him and others, and believing the appearances to be real; and not discriminating with a lawyer's mind, conceived that his view of her manner of living, of the plan of the estate, and so forth, amounted to knowledge of what he asserted; and that he did not make the representation upon mere hearsay, and asserted this without any intention to deceive the plaintiff. This therefore differs the case essentially from *Pasley v. Freeman*, admitting the law there to have been correctly stated; and I therefore wish it to be again submitted to the jury, and that if any doubt be entertained, the question may be put on the record.

Rule absolute.

SHAWE against FELTON.

Tuesday,
Nov. 24th.

THIS was an action on a policy of insurance on the ship *Indian*, and goods, valued at 6600*l.* on a voyage at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and from thence to her port or ports of discharge, sale, and final destination in the *West Indies* and *America*, and until she was moored twenty-four hours in safety. At the trial before Lord *Kenyon*, C. J. at the last Sittings at *Guildhall*, it was proved that the ship was sea-worthy when she sailed from *Liverpool*; and it was not disputed that the insurers were interested in the ship and outfit, (including provisions and sea-stores laid in for the slaves which were to be taken in on the coast of *Africa*, and also wages advanced to the [110] crew,) to the extent of the value insured. The ship arrived on the coast of *Africa*, took in a cargo of slaves there, and proceeded to *Demerara*. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage, that it was with the greatest difficulty

On an insurance on ship and goods valued at so much, on a voyage to *Africa* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk; held that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market.

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she was kept afloat by pumping until she reached *Demerara*, almost a wreck, where she was obliged to be lashed alongside of a hulk, to keep her from sinking; and in attempting to remove her from thence to the shore, a few days afterwards, she sunk, although the distance was only about fifty yards. At the time of her arrival at *Demerara* her stores were considerably expended. The ship was originally destined there, in the first instance, with directions to the captain to proceed to other ports and places in case he could not dispose of the slaves there at a certain average price. And his letter of instructions from his owners contained the following direction, "As your vessel is not according to the late Act of Parliament (a), we would have you sell her in the West Indies, provided you can procure 1200*l.*, but expect you will get from 1500*l.* to 1200*l.* Should you not dispose of her, you will procure what freight you can for *Liverpool*." In fact, the vessel having been surveyed at *Demerara*, and condemned as unserviceable, was sold only for 388*l.* In consequence of this the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he might otherwise have done, had he been enabled to proceed to other places: but still so as to cover the average price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship; and the verdict was taken for the full amount of the sum insured, it being a valued policy.

A rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the grounds that the subject-matter of the insurance was so much reduced from the original value at the time of the loss, (if it were to be considered as a total loss), that the sum valued in the policy ought not to conclude the underwriter. That a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject-matter continued nearly in the same state as at first, allowing for usual wear and tear. That in particular it ought not to conclude in this case; because not only the actual worth of the ship was by the owner's own confession of so much less than the stipulated

(a) This was one of the several Acts which passed for the regulation of the African slave trade, limiting the number of slaves to the tonnage, and requiring the vessels to be of a certain built. The Act alluded to was to take place after the voyage in question commenced,

value, but also the stores which were included in the insurance were profitably expended by him in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore, so far from the plaintiff having incurred any loss in this respect for which he was entitled to an indemnity, he was in fact a considerable gainer by the adventure.

The Attorney-General, Erskine, Park and Wood, shewed cause against the rule. It was first attempted at the trial, to shew that the ship was not sea-worthy when she sailed; but that failing, it was next insisted that there was not a total loss, inasmuch as the ship was moored above 24 hours at *Demerara* before she sunk; but that also failed: for taking *Demerara* to be in the event her ultimate port of discharge, which only became so because the vessel was not in a condition to proceed further and take the chance of a better market; still it appeared that she was not moored in safety for a moment, but came into the port a wreck, with her death's wound which she received at sea. Now, it is insisted that the policy, though valued, must be opened under the circumstances. But this is contrary to the whole course of proceeding with respect to valued policies. It is not pretended that the property insured was over-valued in the first instance, but that by wear and tear and the consumption of provisions and ship's stores, which were covered by the policy, the value had been reduced. If this were admitted, it would take away all certainty, not only from valued, but from open policies; for every day's continuance of the voyage must reduce the value in these respects. It happens, indeed, in the present instance, that the object of the voyage was not defeated, because the slaves were preserved: but this is an insurance on the ship and stores, and the same objection would have applied if the ship had sunk at sea, near to the same port, and all on board had perished. It might still have been said, that at the time the loss actually happened, there was the same diminution in the actual value of the property insured. Besides, the lowest sum for which the ship was directed to be sold is no criterion of the value; for the owner could no longer make use of her for the purpose for which she was originally built, and therefore it was more advantageous to him to dispose of her at once, even at a loss. At any rate, this being a valued policy, for which the underwriter receives an adequate premium, he is concluded from an examination into the value at any subsequent period of the

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voyage, no fraud being imputed to the plaintiff in the first instance. The custom of making valued policies arose soon after the stat. 19 Geo. 2. c. 37 (a). *Magens (b) on Insurance*, which was first published here in 1755, nine years after the statute, treats it as a settled custom. In *Le Cras v. Hughes (c)* Lord Mansfield said, "The constant usage since the stat. 19 Geo. 2. in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it: but an average loss opens the policy. I will give you the origin of this custom: it was in a case of *Erasmus v. Banks*, Mich. 21 Geo. 2. where Lord C. J. Lee said, *Valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only*. On the 13th December 1747, the same point came again before the Court in *Smith v. Flexney*, and was so determined." Lord Mansfield then proceeded to observe, that it was a reasonable usage, and ought to be the rule.

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Gibbs and Cassels, in support of the rule, admitted that a valued policy was not to be opened unless there were fraud where the thing valued was the thing lost: but they contended that here the subject-matter of the valuation was not the subject of the loss. Admitting that the vessel with her outfit was worth 6600*l.* when the insurance was made; yet as a great proportion of that value, to the amount of above 3000*l.* consisted in those stores and provisions, out of which the profit of the voyage was to arise by the expenditure of them, and as in fact the slaves who were purchased and sustained out of that expenditure all arrived safe and produced the profit of the voyage, the subject-matter of the insurance, as to so much, was not lost to the plaintiff, but arrived at the place of its destination, and has been received by him in the shape of profit upon the voyage. The same observation would apply to another sum of about 400*l.* paid in advance of the seamen's wages at *Liverpool*. At any rate, there is no instance in the books of a total loss, where the object of the voyage was accomplished, and the subject-matter of the insurance arrived in specie at the place of destination. It is, therefore, an attempt to call upon the underwriters for an indemnity to the amount of 6600*l.*, when upon the plain-

(a) This was to prohibit wagering policies, "interest or no interest, or without further proof of interest than the policy."

(b) *Mag.* 1 vol. 35.

(c) *E. 22 Geo. 3.* vide *S. C. Parke on Insur.*

tiff's own shewing, he has not been damnified to a 6th of the amount; and is nothing less than a wagering policy, within the prohibition of the statute.

LORD KENYON, C. J. The jury had no doubt but that the ship was sea-worthy when she sailed, and that there was a total loss; for though she arrived at *Demerara*, she was never moored twenty-four hours, nor a moment in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed. It is not pretended now that there was any fraud in the case: but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the stat. of the 19 *Geo.* 2. passed: for very soon after they were decided to be legal by as cautious, and upright, and painstaking, a judge as ever presided in this Court (Lord C. J. *Lee*.) He was succeeded by Sir *Dudley Ryder*, and this latter by Lord *Mansfield*; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong; and the rules by which this and other commercial nations have so long regulated their dealings are now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding every thing that has gone before. If we were to enter into the calculations which have been contended for, every valued policy would be to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute, I am not one who wish *quieta movere*.

GROSE, J. We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application.

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LAWRENCE, J. As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the stat. of *Geo.* 2. it would require very strong reasons to shew that it is wrong. That statute was passed in order to prohibit mere wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made, interest or no interest, or without further proof of interest than the policy itself. The effect therefore of a valued policy is not to conclude the underwriter from shewing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject-matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy, to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an *African* voyage there ought to be a difference in this respect between these and other trading adventurers, the underwriters may if they please introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present, there appears no ground for making any such distinction.

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LE BLANC, J. The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ship and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value. As to the owner himself having estimated the value of the property at so much less than the sum at which it was insured, many things may happen to render a vessel of less value when the voyage is concluded, although the subject-matter exists; the amount of the repairs required, &c. The rule having been so long laid down, as to valued policies, it is too late to open it again.

Rule discharged.

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NEATE and others, Assignees of SANDWELL a Bankrupt,
against BALL and others.

Tuesday,
Nov. 24th.

IN trover for certain bags of wool, it appeared that the defendants were *Spanish* wool merchants in *Bristol*, with whom *Sandwell* had before his bankruptcy been in the habit of dealing for that commodity. The course of dealing between them was, that sometimes *Sandwell* ordered the wools, sometimes they were sent by the defendants to him without any specific order; but they always gave him the option of returning the goods if he had no call for them; though previous to the transaction in question none had ever been in fact returned. In the present instance an order for 13 bags of wool had been given in *December* 1800, which were directed by [118] *Sandwell* to be sent from *Southampton* (where they were deposited with the defendant's agent) to *Devizes*, where *Sandwell* lived, about the middle of *February*. The defendants sent him the invoice some time in *January*: and on the 14th of *February* the bags were sent. *Sandwell* was not at home when they arrived and were deposited in his warehouse; but on his return home the same day he gave orders not to have the bags opened, and they were not in fact opened; but he gave the invoice to his foreman, and directed him to weigh off and examine the wools therewith: and they were in fact deposited along with other goods of the bankrupt. On the 4th of *March*, *Sandwell* wrote the letter after-mentioned to the defendant, and on the same day delivered four of the bags to a common carrier to take back to the defendants, (who received them on the 6th;) and on the 5th *Sandwell* delivered the remaining nine bags at the same carrier's warehouse with the same direction, and wrote another letter to the defendants as after-mentioned. The first letter

A trader orders bags of wool of defendants (merchants) in *December*, which are delivered on the 19th of *February* following, and by the course of dealing the trader has the option of re-turning the wool for which he has no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice; he being then in embarrassed circumstances and intend-

ing not to take them into the account of his stock if in the event he found himself unable to pursue his business. Afterwards on the 4th and 5th of *March*, being then avowedly insolvent, he returns the bags with a letter to the merchants declaring his situation, and hoping that they will have no objection to take back the wool, and requesting the favour of a line of approbation thereof; which letter is received, and the approbation given after an act of bankruptcy committed on the same day the letter was sent. Held that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them; but that the trader's assignees are entitled to the property.

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from *Sandwell* to the defendants, dated "*Devizes*, 4th *March* 1801," was as follows: "I am sorry to be under the necessity of returning the wool I lately received from you, I cannot take it to account. The bearer will deliver you four bags, and to-morrow the remainder shall go. I will write you per post," &c. In the second letter, dated "*Devizes*, 5th *March* 1801," *Sandwell* wrote to the defendants: "Trade being so bad at this time as to make it doubtful whether I can pursue it with any advantage, and having met with some losses, which quite dispirit me, I have taken the liberty of returning you by a cart this morning four bags of the thirteen you lately sent me, and have deposited the remaining nine bags in the house of *F.* the carrier for your use. I have never taken these wools into my stock, and therefore hope you will have no objection to receive them; and enclosed I send you the invoice. Be so good as to favour me with a line of approbation hereof, &c. P. S. I happened to be from home when the wools were brought, otherwise I should not have taken them into my house." In reply to these letters the defendants on the 7th of *March* wrote *Sandwell* a letter, signifying the receipt of his letter and the four bags of wool, which they had credited to his account, as they would the remaining nine bags when received. The bankrupt himself deposed, that at the time of his returning the wools he had not a bankruptcy in contemplation; but that his affairs were in an embarrassed state, and he was sensible that he was insolvent, but was undecided whether he should call his creditors together or not. That if he had been at home when the wools arrived he should not have received them, being then embarrassed, and having had orders countermanded, which he had expected to execute when they were ordered from the defendants; and that he thought it hard and unjust to the defendants to take the goods; and that he had a right to return them at his option: and that he did not take them into the account of his stock. That after returning the wools he made one or two payments, but found himself unable to pay any other demands. He was denied to a creditor on the evening of the 5th of *March* after the remainder of the goods had been sent to the carriers; and on the 6th he left his house.

The action was brought by the plaintiffs, as assignees under the commission of bankrupt issued against him, to recover the
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four bags which the defendants had received; it being agreed that the other nine bags, which were delivered to the carrier and never forwarded * to the defendants, should abide the event of this cause. A verdict was found for the plaintiffs at the trial before Lord *Kenyon*, C. J. at the Sittings after last *Trinity* Term at *Guildhall*; and a rule was obtained, principally on the authority of *Atkin v. Barwick (a)*, calling on the plaintiffs to shew cause why there should not be a new trial. Against which

The Attorney-General and *Hovell* now shewed cause. Whatever the bankrupt's intentions might have been from the time the goods first came to his possession until he returned them, or however he might have refused them if he had been at home when they arrived; yet the goods having been in fact deposited in his warehouse, and he having acquiesced in that from the 19th of *February* till the 4th of *March*, and the goods having been weighed off, and mixed with his other property during all that time, the delivery to him was complete, and the property became absolutely vested in him; so that it was not competent to him, in a state of insolvency, and at the very eve of bankruptcy, to rescind the contract and restore the goods to the defendants. During all the time the goods formed part of his visible stock in trade, upon which he gained credit; and the circumstance of his having given orders not to have them opened cannot vary the question; because that could not be known to the world at large; and such an exception would be repugnant to the principle of the bankrupt laws. The case of *Atkin v. Barwick*, if it be law, is at any rate distinguishable from the present; for a much longer period intervened between the return of the goods, which was on the 18th of *May*, and the bankruptcy, which was not till the 9th of *June*. But what is more material is the explanation of that case given by Lord *Mausfield* in *Harman v. Fisher (b)*, and *Alderson v. Temple (c)*, and since adopted by Lord *Kenyon* in *Barnes v. Freeland (d)*, that the trader refused to accept the goods, and returned them; and that though the judgment might be sustained, the reasons were wrong. Perhaps the better way would be to deny the case to be law altogether; for it seems difficult to say that the goods

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(a) 1 *Stra.* 165. The same case is reported in *Fortesc.* 355. 10 *Mod.* 431. and 11 *Mod.* 295.

(b) *Cowp.* 125.

(c) 4 *Burr.* 2239.

(d) 6 *Term Rep.* 35.

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had not been accepted; and if so, the authority of it is much trenched upon by all the later decisions. With respect to the case *Salte v. Field* (a), where the return of the goods was sustained, the principal actually disaffirmed by letter the contract made by his agent before the delivery of the goods, although the letter was not received till after the delivery to the vendee's packer, in whose hands the goods were attached by the creditors. And though the other party was at liberty to have refused the renunciation of the contract entered into by an authorized agent; yet having accepted it, the countermand related back antecedent to the delivery itself. But where, as in *Smith v. Field* (b), the vendor under the same circumstances elected not to rescind the contract, by attaching the goods in the packer's hands as the property of the vendee, it was ruled that the assignees of the latter who became a bankrupt were entitled to retain the goods.

[122] *Erskine, Gibbs, and Scarlett*, contra. The honesty of the case on the part of the bankrupt, as well as of the defendants, cannot be impeached; and unless *Atkin v. Barwick* be denied to be law, this case is also supported by positive authority. In none of the cases is the authority of that judgment disputed, but only the reasons which were given for it. On the contrary, in *Harman v. Fishar* (c), Lord Mansfield expressly says, that the judgment in *Atkin v. Barwick* was right; and it was also supported in *Salte v. Field* (d), and *Smith v. Field* (e). But the account given of the same case in *Barnes v. Freeland* (f), is not accurately stated; for it could not be said, (as is supposed in the report) that the goods there had not been accepted by the vendee. For they were sent on the 7th of April, and not returned till the 18th of May; and it cannot be taken that they were upon the road during all that interval (g). Here there never was a complete sale and delivery of the goods. By the usual course of dealing between these parties *Sandwell* was at liberty

(a) 5 Term Rep. 211.

(b) Ib. 422.

(c) Cowp. 125.

(d) 5 Term Rep. 211.

(e) 5 Term Rep. 422.

(f) 6 Term Rep. 85.

(g) This fact, which seems an important one, is not clearly stated in the report in *Strange*: But it is not very improbable that the goods might have lingered so long on the road between *London* and *Pewry* as to have been returned within the period mentioned on the first convenient opportunity after they were received; so as to justify the explanation of the case as it has been frequently given from the Bench.

to return any goods even after delivery in fact, which he found he had no occasion for. And though the goods were in fact deposited in his warehouse, yet that being without his consent could not take away his election. He was from home at the time of the deposit; but as soon as he returned he did as much as in him lay to repudiate the delivery, by declaring his dissent to it, and giving directions not to open the bags nor enter them in his stock. The weighing them off was to guard against any mistake in the invoice, for which he might become responsible though the goods were returned. It is true, he did not immediately inform the defendants that he had elected not to take the goods; but supposing they had remained with the carrier, the option would have continued open to him till the defendants themselves chose to recall the goods: then the fact of their having been deposited in his own warehouse, without his knowledge, and against his will, cannot vary the case. If he still retained the option of returning them without the particular leave of the defendants, the legal consequence must be the same, and cannot be altered by the insolvency of the party. In all the other cases relied on *à contrà* there was an absolute acceptance of the goods; the vendee had not the power of rescinding the contract without the assent of the vendor, even supposing the former had continued solvent; then by the operation of the bankrupt laws he ceased to have the power of doing so in a state of insolvency, or in contemplation of bankruptcy. It is not necessary to decide here whether *Sandwell* could have exercised the option reserved to him after the act of bankruptcy; because it might be said that by the operation of the bankrupt laws all property was divested out of him by relation back to that time; but it is enough that the election was exercised before the bankruptcy, while the legal as well as equitable property continued in him; there being no fraudulent intent here to prefer one creditor to the rest in contemplation of bankruptcy. If his permitting the bags to remain in his warehouse were evidence of an acceptance on his part, at least it is explained to be a qualified acceptance, and such as reserved to him the original option which he had of returning the goods, if he found he had no occasion for them.

Lord KENYON, C. J. If in these cases where goods continue in bulk, and discernible from the general mass of the trader's property at the time of a bankruptcy, they could be returned to the

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the original owners who have received no compensation for them, without injury to the claims of others, it would be much to be wished; but that* cannot be done without breaking in upon the whole system of the bankrupt laws. This case was tried upon the evidence of the bankrupt and his servants; and it was very evident that they wished to favour the defendant in the transaction. The jury were told by me, that if the goods were not delivered to and accepted by the bankrupt there was an end of the question, and the property remained in the consignors; but if otherwise, the bankrupt had no power to rescind the contract when he returned them; upon this they found for the plaintiffs. The verdict is now moved to be set aside on the authority of *Atkin v. Barwick*, which is contended to be in point for the defendants. Certainly the cases do approach each other a little: but of that case I must observe, that I never heard it quoted without some comment upon the law of it. Each gentleman at the bar finds fault with it in his turn. In my opinion Lord *Mansfield* has extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded; namely, that the trader, finding himself in a failing condition, very honestly did not accept the goods, but returned them. And if the goods were not accepted, the judgment was right. Cases are to be resorted to for the sake of the principle on which they were decided, and our opinions ought not to be governed by every little matter of difference which may be pointed out. Then see what this case is, as applicable to the principle which governs in such cases. Did the bankrupt accept the goods? In considering that question never let it be forgotten, that the bankrupt lived at *Devizes* and the defendants at *Bristol*, between which places there is not only daily but it may almost be said hourly intercourse. That on the 19th of *February* the goods came into the custody of the bankrupt, on which day he, doubting his own situation, and meaning, in case he could not avoid the insolvency which threatened him, to do what was right by the defendants, wished to keep matters in such a state that he might have it in his own power to dispose of the goods in what manner he pleased according to the event. That might be well meant in him: but it is what the law cannot permit. He was to decide immediately whether he would accept or return the goods. But see what he did. He received them on the 19th of *February* into his warehouse, and there he kept them

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as his goods till the 4th and 5th of *March*. If he had continued solvent, and the defendants had refused to receive them back after such an interval, it would have been asked by them whether he was at liberty to keep them for fourteen days, without giving any notice that he did not chuse to accept them, in order to take advantage of the rise or fall of the market. However he makes the discovery on the 4th of *March*, that he has no occasion for the goods; and on the 5th he writes the letter which has been read: knowing at the very time that he was insolvent, and ordering himself to be denied to a creditor in the evening of the 5th. Morally speaking, I do not blame him for what he wished to do: but by law he could not do it. The power of conferring favours, however well merited, was out of his hands at the time. It might as well be contended that he had an option to return the goods even after the act of bankruptcy. Then see again when the defendants agreed to this; not till the 7th of *March*, which was after the act of bankruptcy, when the bankrupt was incompetent to make any bargain concerning the goods. Till the re-delivery on the 7th the goods must be considered as continuing in the hands of the bankrupt, because they were in the custody of the carrier who was his agent for the purpose. I will not say that the case of *Atkin v. Barwick* was wrongly decided: I leave it to others to consider that point: but Lord *Mansfield* has given a ground on which the Judges there went, or ought to have gone, in deciding it. I think we disturb no case by our present opinions, but we preserve the system of the bankrupt laws unimpaired in deciding with the plaintiffs.

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GROSE, J. The only ground to support the judgment in *Atkin v. Barwick* was what Lord *Mansfield* stated it to be in the subsequent case of *Harman v. Fisher*, namely, that there had been no acceptance of the goods by the trader. The principle question then here is, Whether the goods were accepted by the bankrupt or not? for if they were, he was insolvent on the 4th and 5th of *March* when they were returned, and therefore was not then in a capacity to rescind the contract. Now all the evidence shews an acceptance, and it is so found by the verdict.

LAWRENCE, J. The great argument for the defendants has rested on the ground that the bankrupt had an election to return the goods continuing down to the time of his bankruptcy, and that the property did not vest in him until he had made his election.

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election. But the letter alluded to contradicts that idea; for it is a solicitation to the defendants to receive back the goods, for the reasons which he assigns touching his own situation. It is true, the bankrupt was not at home when the goods were first brought to his house in *February*; but that cannot make any difference in this case; for if he did not chuse to accept them after his return home, he had nothing more to do than to write to the defendants to that effect. He might have said that he was not bound to accept them, and therefore he returned them. Instead of which he kept them till the 4th and 5th of *March*, and then wrote to the defendants, not as if insisting that he was not bound to accept them, but *hoping that they would have no objections to receive them*, and requesting the favour of a line of *approbation thereof*. This is inconsistent with the ground of defence now set up.

LE BLANC, J. The question is, Whether the property of the goods were vested in the bankrupt? The facts decide the case. For supposing by the course of dealing, that he had an option to return the goods, which had been sent by his order, yet he has not done so. When he knew the goods were in his house, instead of returning them to the defendants, he kept them in his warehouse, where they had been deposited. And it would be opening a door to great fraud on the bankrupt laws, if we were to hold that the vesting or not vesting of the property of goods sent to a trader, depended upon whether or not he entered them in his books as part of his stock. How long shall he be allowed to keep them in his possession without making such entry? Certainly when the bankrupt wrote the letter which has been referred to, he considered that he had before accepted the goods. Therefore my opinion is formed on this, that the bankrupt had taken the goods into his possession; and that when he returned them he was not at liberty so to do.

Rule discharged.

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YATE *against* WILLAN.*Wednesday,
Nov. 25th.*

THE plaintiff declared against the defendant as the owner and proprietor of a certain coach called the *London and Shrewsbury* mail-coach for the carriage of passengers and goods for hire, between *London* and *Shrewsbury*, and intermediate places. That the plaintiff for a certain hire had taken and hired a place in the coach as an inside passenger, to go from the *Green Man and Still* in *Oxford-street* to *Oxford*, being an intermediate place, &c. and, as such passenger, was entitled and was about to carry with him, in and by the said coach, a certain travelling trunk, containing divers articles, &c. of the value of 30*l.* And thereupon, in consideration that the plaintiff, at the instance and request of the defendant, would forbear to carry with him the said trunk as such passenger, as aforesaid, the defendant undertook and promised the plaintiff that he would take care of the trunk, and safely send and forward the same by the next night's mail-coach to *Oxford*, and there deliver the same to the plaintiff. That the plaintiff confiding in the said promise did forbear to carry the trunk with him as such passenger, &c. whereof the defendant had notice. But that though the defendant, as such owner, &c. had and received the said trunk for the purpose of taking care of and forwarding the same, as aforesaid, &c. and causing the same to be safely delivered to the plaintiff at *Oxford*: yet not regarding his said promise and undertaking, &c. the defendant so carelessly and negligently conducted himself about the conveyance of the said trunk, that the same was lost, &c. There were two other special counts, (one charging * the defendant as a common carrier,) in substance the same, and a fourth count for money had and received. The defendant pleaded the general issue, and paid 5*l.* into Court upon the three special counts.

At the trial before *Lawrence, J.* at *Oxford*, it was proved on the part of the plaintiff, that the defendant had paid 5*l.* into Court on the special counts, and that the value of the trunk was 20*l.* and there the plaintiff rested his case, contending that the payment of money into Court on those counts was an admission of the contract as there laid, and concluded the defendant from disputing it. This was resisted on the part of the defendant:

The payment of money into Court upon a count stating a special contract is an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof.

Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into Court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5*l.* unless entered and paid for accordingly: though if no money had been paid into Court, the plaintiff must have been nonsuited on such evidence.

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1801. defendant; and the learned Judge, reserving the point, permitted the latter to go into proof of his defence; when it appeared that the plaintiff had not previously taken any place in the mail, but waited at the *Green Man and Still* in *Oxford-street*, for the coming of the coach, intending to proceed by it if there were room for him. He accordingly obtained a vacant place; but there not being room for his luggage, it was agreed that it should be sent by the next day's mail, according to the directions which the defendant gave. But no account was given what had become of the trunk. It was also proved, that there was stuck up, in large letters, upon a board in the coach-office where the defendant was before he took his departure, a notice, (such as is usual in these cases,) purporting that the proprietors of the carriage would not be responsible for more than 5*l.* for any species of property contained in any article lost or damaged, unless the same were booked and paid for according to the value: on the present occasion the plaintiff paid 2*d.* for the booking; but nothing was paid for the carriage. A verdict was taken for the plaintiff for 15*l.* besides the 5*l.* paid into Court: and it was agreed, that if the Court should

[130] be of opinion, that the contract was not admitted by the payment of money into Court on the special counts, then a verdict should be entered for the defendant. A rule nisi having been accordingly obtained for entering a verdict for the defendant,

Milles, Abbott, and Taunton shewed cause against it. The rule for paying money into Court was made for the benefit of a defendant. If the declaration consist but of one count, he knows whether the contract be therein truly stated, and how to apply his defence. If he dispute the contract itself declared upon, he must do so upon his plea. If he admit the contract, but only dispute the quantum of the damage, he may pay into Court so much as he admits to be due, and deny the rest by his plea. The same observation applies where there are several counts; the defendant may select to pay money into Court upon either, which will not conclude him from denying the contract stated in the rest: otherwise, if he pay money into Court generally; for that refers to all the counts. But from the very nature of the thing, the payment of money into Court upon any particular count must amount to an admission of the truth of the contract therein stated; for unless it be truly stated, nothing can be due upon it. It therefore leaves nothing in dispute but

but the quantum: and it throws the hazard upon the plaintiff of shewing that more is due, if he proceed in the action. Where money is thus paid the plaintiff is thrown off his guard, and does not go prepared to prove the contract at the trial, but only the amount of the damages which are disputed. Then the evidence offered at the trial by the defendant was inadmissible, because it goes to vary the contract as laid; it shews that the contract was not general to carry for him as the plaintiff alleges, but a limited and qualified undertaking to be answerable for 5*l.* and no more. The cases of *Cox v. Parry (a)*, *Watkins v. Towers (b)*, *Hutton v. Bolton (c)*, and *Gutteridge v. Smith (d)*, all shew that the payment of money into Court is an admission of the contract in the count on which it is so paid: though, as in the first mentioned case, if the contract itself be illegal, the Court will not permit the plaintiff to recover beyond the amount of what has been paid in; because they will not give effect to an illegal contract, though the defendant admit that he entered into it.

Williams, Serjt. *Mauley*, and *Bedford*, in support of the rule. Admitting that the payment of money into Court, is an acknowledgment of the cause of action stated in the counts on which it is paid in; yet that does not conclude the defence made in this case, which is distinguishable from all those cited. The evidence offered did not go to *vary* the contract declared on; it admits the undertaking to carry; but like the case of a valued policy, it is tantamount to an admission on the part of the plaintiff, that the value of the trunk did not exceed 5*l.*, not having been entered and paid for as such. [Lord *Kenyon* observed, that in valued policies the plaintiff declared on them as such.] In *Gutteridge v. Smith*, though the payment of money into Court on a count on a bill of exchange was ruled to be an admission of the defendant's hand-writing to such bill; yet it was not holden to be an admission that the whole bill was due: and in such case no doubt evidence of an acknowledgment by the plaintiff, that only a certain part was due, would be received. *Cox v. Parry* went still further; for though the contract was admitted, yet the plaintiff was holden not to be concluded by such payment of money from disputing the legality of it beyond the amount of the sum

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(a) 1 *Term Rep.* 464.(b) 2 *Term Rep.* 275.(c) *E. 22 Geo. 3. B. R.* cited in *Clay v. Willan*, 1 *H. Blac.* 299.(d) 2 *H. Blac.* 374.

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paid in. In *Gutteridge v. Smith* only three judges were in Court, and one of them differed from the others. In *Hutton v. Bolton*, though the damages laid were above 20*l.* yet the Court permitted the carrier to pay that sum into Court, which was the extent of what he had advertised to bear; for the purpose, as they said, of saving his costs: and yet that would have been nugatory if he thereby admitted the truth of the whole contract stated, which included a larger sum. Here the defendant was obliged to pay the 5*l.* into Court, which he had engaged to answer for; otherwise there must have been a verdict against him to that amount.

Lord KENYON, C. J. The latter argument proceeds upon a mistake: the payment of money into Court on a special count admits the contract as there laid, but leaves the amount of the damages incurred by the breach of it open to dispute. One is always sorry when the real justice of the case is eluded by any trick or mistake; but the Court can only look at the record, and apply the evidence to that. This case, both upon principle and precedent, is so clear, that it is impossible to raise a doubt, if I can but express my ideas upon it as clearly as I conceive them in my own mind. The plaintiff states in several counts the several demands which he has upon the defendant. The latter says, true it is, you have a demand upon me, arising upon the several contracts stated in the first, second, and third counts; but admitting that I am liable to pay you something upon those contracts, yet it is not so much as you claim, but only 5*l.* But as to the other demand, I owe you nothing. The plaintiff does not agree to this, and the parties come to trial to have it ascertained, whether more than that sum is due upon those special contracts. If the defendant had denied all, the plaintiff must have proved all; but as to such counts, where he admits the contracts, but only disputes the quantum of the damage, the plaintiff only comes prepared to prove the amount beyond the 5*l.* paid into Court. At the trial the defendant changes his ground and says, that the plaintiff has no right to recover beyond the 5*l.* because the contract entered into was not what is stated by him in his declaration, but a different contract. To which the plain answer is; that he should not then have admitted that the plaintiff had any such demand as he states, but should have disputed the contract altogether. And then if he had shewn that it was not a general agreement to be answerable for the

the value of the goods lost or damaged, but a special limited agreement to be answerable for no more than 5*l.* value, unless it were entered and paid for accordingly, the plaintiff must have been nonsuited; for such a defence would have negatived the contracts stated in the declaration.

GROSE, J. It is too late now to say, that the payment of money into Court is not an admission of the contract as stated in the count on which it is so paid. In this case it admits the general agreement declared on to be answerable for the safe carriage of the goods; whereas the real defence is, that the defendant did not make a general but a particular and limited agreement to be answerable: and therefore if the defendant had denied it altogether, the plaintiff must upon this evidence have been nonsuited.

LAWRENCE, J. The plaintiff states a certain agreement, and by the payment of money upon the contract stated the defendant admits that he did so contract, but contends that he is not liable for more than 5*l.* damages under that contract. The admission can refer to nothing else. He admits, (as Mr. Justice *Ashhurst* says in giving the judgment of the Court in *Cor v. Parry (a)*, that the plaintiff has a right to maintain the action, and reduces the question simply to the quantum of damages he is entitled to recover. The residue of that case is no more than this, that if the contract declared upon be illegal, the defendant shall not give it effect by his admission; because no admission of the parties can conclude the Court to make them give effect to an illegal contract. It is said, that if the 5*l.* had not been paid into Court, the plaintiff must have recovered to that amount. But that is not so; for upon this evidence it would have appeared that the defendant had not contracted in the general manner in which the plaintiff has declared, but had only made a limited contract; and therefore the plaintiff must have been nonsuited. If this wanted authority, it is supported by *Clay v. Willan (b)*; for there the Court held, that the plaintiff was not entitled to recover even the 5*l.*, the contract being special, and not general. So in *Pigott v. Dunn (c)*, which was an action against a carrier, where no money was paid into court; the goods lost were above 5*l.* value, but had not been entered and paid for as such. The plaintiff contended, that she was at all

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(a) 1 *Term Rep.* 464.(b) 1 *H. Blac.* 298.(c) *E. 36 Geo. 3. B. R.*

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events entitled to recover the 5*l.*, but the Court ruled otherwise.

LE BLANC, J. In the case of *Hutton v. Bolton*, the Court did not look to the consequences of paying the money into court. The defendant there had applied for leave to do so, which the plaintiff objected to. But the Court admitted it to be done, without deciding what effect it might have. Here the plaintiff declares specially on a general contract to carry the goods for hire. The defendant denies that he made such an undertaking, and contends it was only a limited contract under certain restrictions. Therefore upon the general issue the evidence would have negatived the contract declared on, and the plaintiff must have been nonsuited: but by the payment of money into court on the special counts, he has admitted the contract to be as there laid.

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Rule discharged.

Saturday,
Nov. 28th.

WHITEBORN against EVANS.

By s. 1. of stat. 39 & 40 Geo. 3. c. 104. the jurisdiction of the Court of Requests in London is enlarged from debts of 40*s.* to 5*l.* from the 30th September 1800. and by s. 12. if any action shall be commenced in any other Court to recover any debt not exceeding 5*l.* within the jurisdiction, the plaintiff shall not recover any costs, &c. held that the words "shall be commenced," must by necessary

construction be restrained to the date of the 30th September, and not to the passing of the Act, which was on the 9th of July preceding.

THIS was an action for goods sold and delivered, and on the money counts. At the trial before Lord *Kenyon*, C. J. at the last Sittings at *Guildhall* the plaintiff recovered a verdict for 4*l.* 15*s.*, and the question was, whether he were entitled to costs upon the stat. 39 & 40 Geo. 3 c. 104. (a), the cause of action arising within the jurisdiction of the Court of Requests in *London*. By s. 12. of that statute, "If any action or suit shall be commenced in any other court than the said Court of Requests, for any debt not exceeding 5*l.* and recoverable by virtue of the said recited Acts, (i.e. 3 Jac. 1. c. 15. and 14 Geo. 2. c. 10. which limited the jurisdiction to debts not exceeding 40*s.*) and of this Act, or any of them in the said Court of Requests, then the plaintiff in such action shall not by reason of a verdict for him, or otherwise, be entitled to any costs whatsoever," &c. By s. 1. of the Act, so much of the recited Acts as restrains the jurisdiction of the Court of Requests to debts not exceeding 40*s.* shall from September 30th 1800 be repealed. Here the action was commenced before the 30th, (viz. on the

(a) c. 104. in the arrangement of Private and Local Acts.

24th of *September* 1800,) but after the 9th of *July*, when the Act received the royal assent. 1801.

Garrow shewed cause against a rule for taxing the plaintiff his full costs, on the ground that the words of the 12th clause, that if any action "*shall be commenced*," &c. must refer to the passing of the Act, which was on the 9th of *July* prior to the commencement of this action; and therefore the plaintiff having recovered less than 5*l.* was not entitled to costs. But

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Lord KENYON, C. J. was clearly of a different opinion. The whole Act must be construed together, otherwise the greatest injustice would ensue; for there would be an interval between the 9th of *July* and the 30th of *September*, within which the subject would be without any adequate remedy. Till the latter period he could not have recovered in the Court of Requests, the demand being above 40*s.*, therefore he had no other remedy than to sue in the superior courts.

Mingay in support of the rule.

Per Curiam,

Rule absolute.

REGULA GENERALIS, M. 42 *Geo.* 3.

IT IS ORDERED; that from and after the first day of *Hilary* Term next, no judgment be signed upon any warrant authorizing any attorney to confess judgment, without such warrant being delivered to, and filed by the clerk of the dockets; who is hereby ordered to file the same in the order in which they shall be received.

And it is further ordered; that every attorney of this Court, who shall prepare any warrant of attorney to confess any judgment, which is to be subject to any defeasance, do cause such defeasance to be written on the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

In the Forty-second Year of the Reign of GEORGE III.

1802.

Ex parte MICHELL, Clerk.

Tuesday,
Jan. 26th.

A Rule was obtained on the part of the grantor of an annuity, calling on *James Michell*, clerk, to shew cause why the warrant of attorney and other securities given to secure the annuity should not be delivered up to be cancelled, and proceedings stayed in the mean time. It appeared by the affidavits of *Ann Needham* and others, that previous to the year 1796 she became entitled to certain leasehold and freehold premises, (the latter subject to her mother's right of dower,) and in *April* of that year granted an annuity of 60*l.* to *James Michell* upon three lives for the consideration of 600*l.* which was secured on all the said premises. That 100*l.* part of the consideration money was paid by *Michell* by a banker's check delivered * to one *J. H. S.*, Mrs. *Needham's* agent, by her desire, upon which payment was received by him for her a month before the execution of the deeds for securing the annuity, for which a discount was taken at the time of such execution. It was also alleged in these affidavits, that at the time of such grant the

An annuity secured on lands in fee of equal annual value need not be registered under the stat. 17 *Geo.* 3. c. 26. s. 6., though the annuity were also secured upon leasehold property. A memorial of an annuity, stating the whole consideration to have been paid in money, is good, though part of it were paid by means of a banker's check, the value of which had been actually received by the grantor some time before the execution of the deeds.

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value of the freehold premises was not equal to the payment of the annuity. The memorial registered under the stat. 17 *Geo.* 3. c. 26. was of a bond of the grantor for securing the annuity, and also of an indenture dated 28th *April* 1796, whereby *Ann Needham*, "in consideration of the sum of 600*l.* of lawful money, "&c. paid to her by *J. Michell* in manner following, viz. 100*l.* "thereinafter paid by *J. M.* to *J. H. S.* or bearer by the direction of the said *Ann Needham*, and the further sum of 500*l.* "paid at the time of the execution of the said indenture, did "grant, " &c. to *J. M.* the annuity in question, payable out of certain freehold premises, and also out of certain leasehold premises therein mentioned.

On the part of *Michell* it was sworn, that the freehold premises, which consisted of certain houses in *London*, had been represented by the grantor to be of the value of the annuity at the time, and so appeared to be on the inspection of his agent as well as from other circumstances which were stated: and that the 100*l.* had been advanced to the grantor a month before the deeds were prepared for her accommodation in the manner described. There were other matters in the affidavits not material to be stated.

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The objection to the annuity principally relied on was, 1. assuming the value of the freehold premises not to be equal to the payment of the annuity, that the memorial was defective in stating that the 100*l.* part of the consideration for the annuity was paid to the grantor in money, whereas in truth the payment was made by a banker's check payable to *J. H. S.* or bearer, and delivered to him as the agent of the grantor by her desire. 2. That the same objection was fatal, though the freehold premises were of the requisite value, the annuity being also secured upon leasehold premises which were not excepted out of the operation of the statute.

Gibbs and *Marryat*, in shewing cause against the rule, insisted that as the money had been received by the grantor before the execution of the deeds for securing the annuity, the whole consideration was properly stated to have been paid in money; and it was immaterial to describe by what means the money had come to her hands. That the cases requiring the particular securities to be stated only applied where those securities had not been converted into cash at the time, and therefore it was uncertain whether they would afterwards be
 available

available or not. That at any rate, as the annuity was secured on freehold premises of adequate value, the case was excepted by the 8th section of the Act out of the general operation of it; and therefore there was no necessity for any memorial to be registered.

1802.

Ex parte
MICHELL,
Clerk.

Garrow and *Reader* contrà contended, that the case came within the statute unless the annuity were secured upon freehold alone of equal or greater annual value than the annuity. That here the freehold was stated to be of less value at the time, which was confirmed by its present state, and also by the very circumstance of the grantee requiring the additional security of the leasehold premises. Then the objection to the statement of the consideration in the memorial was fatal, according to the cases of *Berry v. Bentley* (a), and *Pool v. Cabanes* (b); where it was determined that if any part of the consideration of an annuity were paid by a banker's check, it ought to be so stated in the memorial.

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GROSE, J. (c) It appears to me upon the whole, that the annual value of the freehold premises was more than equal to the annuity, and therefore there was no occasion to register any memorial; which gets rid of the objection as to the payment of the 100*l.* being therein stated to be in money instead of by a banker's check. I will however say a word or two on that point. All the prior cases in which it has been deemed necessary to set out in the memorial the payment of any part of the consideration money by bankers' checks (where such has been the fact) have been where the check was delivered as payment at the time of executing the deeds, when non constat it would ever be paid. But here the money had been actually received upon the check a month before by the grantor; therefore at the time of such execution the consideration might well be stated to be so much money paid to her.

LAWRENCE, J. It has never yet been determined that when the annuity is secured both upon leasehold and freehold property, though the annual value of the latter be equal to the annuity, yet a memorial of the annuity must be registered under the statute; and the reason of the Act seems to be against such a

(a) 6 Term Rep. 690.

(b) 8 Term Rep. 328.

(c) Lord Kenyon, C. J. was absent on this day from indisposition, and continued so during the rest of the Term, with the exception of one day, when nothing particular occurred.

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Ex parte
MICHELL.
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construction. The object of the Legislature was to guard necessitous persons against imposition; and therefore they required that the grant of annuities in general should be memorialized, in order that it might appear what the true consideration was: but they excepted out of the general rule (among others) annuities secured on land of equal or greater annual value whereof the grantors were seised in fee or in tail in possession at the time; conceiving such persons to be in a condition to bargain fairly for themselves. The exception therefore cannot the less apply to one who in addition to a freehold of adequate value is in possession of leasehold property also upon which he can give security. Now according to the weight of the evidence in this case, it appears to me that the freehold was at least of equal value to the annuity. Then as to the objection taken to the memorial, if the money payable on the banker's check were actually received by the grantor before the grant of the annuity, it may, I conceive, be stated as money paid to her by the grantee, without particularizing the means by which the receipt of the money was before obtained by her.

LE BLANC, J. I think the balance of the evidence is, that the freehold premises were of adequate value to the annuity: they were so represented and considered to be at the time; and if they were not, it would have been easy for the grantor to have shewn distinctly when and how the value was lessened. As to the 100*l.* stated in the memorial to be paid in money, it having been actually received by the grantor before the deeds were executed was money had and received by her, by whatever means it was so received; therefore the consideration was truly stated in the memorial.

Rule discharged with costs.

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Tuesday,
Jan. 26th.

WILKS and Another *against* BACK.

One who executes a deed for another under a power of attorney, must execute it in the name of his principal; but if that be done it matters not in what form of words such execution is denoted by the signature of the names: as if opposite the seal be written "for *J. B.*" (the principal) "*M. W.*" (the attorney). (L. S.)

THE defendant being indebted upon an account to the plaintiffs *Wilks* and *Browne*, who were formerly in partnership, as millers, it was agreed to refer the matter to arbitration; and accordingly bonds of submission were entered into by the parties as after-mentioned; and the arbitrators by their award

dated

dated 14th *August* 1801, reciting that by two several bonds dated 15th *June* 1801, under the respective hands and seals of M. Wilks and J. Browne, millers, and late partners, and of *W. Back*, the parties became mutually bound to abide the award, &c. proceeded to award the sum of 407*l.* 9*s.* 7*d.* to be due on the balance of accounts from the defendant to the plaintiffs, &c.

1802.

WILKS
and Another
against
BACK.

Upon a motion to set aside the award, the question was at last resolved into this, Whether *Wilks* had competent authority to bind *Browne* his late partner by executing the bond of submission for him. As to which it appeared that by an indenture dated 28th *August* 1799, between *Wilks* and *Browne*, the latter for the considerations therein mentioned did constitute and appoint *Wilks* to be his attorney irrevocable to ask, demand, sue for, compound, and receive all the debts and effects of the said partnership; with full power for *Wilks* to sign, seal, and deliver in the name of *Browne* any deed, &c. whatsoever necessary for the purposes therein mentioned, &c. By virtue of this authority *Wilks* executed the bond of submission in question in this form: "*Matthias Wilks*," (L. S.). "For *James Browne*, "*Matthias Wilks*," (L. S.), and it was sealed and delivered by *Wilks* for himself, and also for his late partner *Browne*; but the latter was not present at the time.

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Garrow and *Parther*, in shewing cause against the rule, did not dispute that according to *Combe's* case (*a*), where any has authority, as attorney, to do an act, he cannot do it in his own name, but in the name of him who gave the authority. But they contended that here the sealing and delivery was done by *Wilks* in the name of *Browne* as well as of himself, which he had authority to do by virtue of the power of attorney of *August* 1799; and that the signing of his own name twice was not material, as he also signed the name of *Browne*, and declared that it was done for him. The form of words used cannot invalidate the act where the authority is sufficient to warrant the act done. If there had been only one seal, yet if the instrument were sealed and delivered for himself and his partner, he having authority so to do, it would have been sufficient, according to the case of *Ball v. Dunsterville* (*b*). It is true that was done in the presence of the other partner; but that was only material in

(a) 9 *Rep.* 76. b.(b) 4 *Term Rep.* 313.

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and Another
against
BACK.

that case, as shewing that it was done by his particular authority: and here was a special authority by deed, to do the act.

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Erskine and Comyn, contra. It is clear from *Harrison v. Jackson (a)* that one partner cannot as such bind another by deed. Then if the authority be derived from the power of attorney, *Wilks* ought to have executed it in the name of *Browne* the principal, and not in his own, according to what was said in *Combe's* case, and confirmed by Lord C. B. *Gilbert* in 4 *Bac. Abr.* 140. and by Lord *Kenyon* in *White v. Cuyler (b)*. So in *Frontin v. Small (c)* a lease made by an attorney in her own name, though stated to be made "for and in the name of" the principal, was holden void, and that no action of covenant lay thereon. Now here it was signed by *Wilks* "for *Browne*;" whereas the signature ought to have been in the name of *Browne*, though made by *Wilks*. Therefore as *Browne* would not be bound by the award, it is void for want of mutuality.

GROSE, J. No doubt the award must be mutual; and for this purpose the bond must be executed by *Browne* as well as by *Wilks*; but this is a sufficient execution by both. I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal and not in his own name; but here it was so done: for where is the difference between signing *J. B.* by *M. W.* his attorney (which must be admitted to be good) and *M. W.* for *J. B.*; in either case the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done.

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LAWRENCE, J. No doubt in point of law, the act done must be the act of the principal, and not of the attorney who is authorized to do it. The whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded. This is not like the case in Lord *Raymond's* Reports where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by *Wilks* for and in the name of his principal: and this is distinctly shewn by the manner of making the signature. Not that even this was necessary to be shewn; for if *Wilks* had

(a) 7 Term Rep. 207.

(b) 6 Term Rep. 177.

(c) 2 Ld. Ray. 1118. S. C. 1 Stra. 705.

sealed and delivered it in the name of *Browne*, that would have been enough without stating that he had so done. However he first signs his own name alone opposite to one seal to denote the sealing and delivery on his own account, and then opposite the other seal he denotes that the sealing and delivery was for *James Browne*. There is no particular form of words required to be used, provided the act be done in the name of the principal.

LE' BLANC, J. *Wilks* first signed it in his own name, as for himself, and then to denote that the act was also done in the name of *Browne*, he signed it again for *James Browne*. I cannot see what difference it can make as to the order in which the names stand.

Rule discharged.

HULL *against* HEIGHTMAN.

1802.
Wilks
 and Another
against
 BACK.

Wednesday,
 Jan. 27th.

INDEBITATUS Assumpsit for wages due to the plaintiff as a seaman on board a *Danish* ship, whereof the defendant was captain, from *Altona* to *London*. Plea non assumpsit. At the trial before *Le Blanc, J.* at the Sittings after last Term at *Guildhall*, the plaintiff proved a service in fact as a seaman on board the ship at and from *Altona* until her arrival at the port of *London*. And it appeared that after the ship had delivered her cargo here, the captain would not give the seamen victuals, but bid them go on shore, [146] saying he could get plenty of their countrymen to go back for their victuals only, since the peace. That the plaintiff and others went on shore: and when the captain required them a few days afterwards to go on board again, they refused, saying, it was too late, for they had the law of him. (They had then brought actions against him.) That previous to his departure for *Denmark* he again required them to come on board, which they again refused. The defence rested on certain written articles of agreement signed by the plaintiff and the rest of the crew, whereby it appeared that they were hired for the voyage from *Altona* to *London* and contract, or for such tortious act of the captain's, whereby he was prevented his wages,

A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general indebitatus assumpsit to recover his wages pro rata as far as *B.*: though he were there wrongfully dismissed by the defendant (the captain): but his remedy is either for the breach of the special

back

1802.
HULLE
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 MAN.

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back again. And there was an express stipulation, that the seamen should assist in bringing the ship back again, and making her fast in a proper place, *before they could make any demand upon the captain for the wages due*, under a certain penalty: and another stipulation *that no person should in foreign parts demand any money of the captain*, but be contented with the wages received in advance, *until the voyage was completed* to the satisfaction of the captain and owners, and the ship and goods again safely arrived at *Altona*. And also that it should at all times be at the captain's own option whether he would give them any money in foreign parts or not. That in like manner no person should demand his discharge in foreign parts, but be obliged to perform the voyage. It concluded with a general clause of obedience to the captain, and for the performance of the duty of the crew: and that if any one should shew himself averse therein, he should not only according to law forfeit the whole of his wages, but also suffer punishment, &c. On proof of this agreement it was insisted by the defendant's counsel at the trial, that the plaintiff had mistaken his remedy, and that an action of indebitatus assumpsit would not lie, but that he ought to have declared specially. On the other hand it was contended, that the plaintiff might recover in this form of action for the rate of his wages up to the time when he was wrongfully turned out of the ship. But *Le Blanc, J.* being of opinion that the wrongful act of the captain did not rescind the special contract by which the plaintiff was precluded from demanding his wages till the end of the voyage; though it gave a cause of action against the captain for the tort whereby the plaintiff was prevented from earning his wages under the contract, directed a nonsuit; with leave to move to set it aside and enter a verdict for the plaintiff for 6*l.* 17*s.* the amount of the wages due to him at the time he left the ship, if he were entitled to recover.

Gibbs now moved accordingly; contending, that the special contract was put an end to by the wrongful act of the defendant, which prevented the plaintiff from performing the whole of what he had undertaken on his part. And therefore he had a right to recover in this form of action so much of his wages as he had actually earned by his labour, and for which he was entitled to a reasonable compensation. And this he said had
 been

been so decided some years ago (*a*), and had been generally adopted in practice. But

The Court, referring to the case of *Weston v. Downes* (*b*), as establishing the principle that while the special contract remained open and not rescinded by the defendant, the plaintiff could not recover on the general counts in assumpsit, held that the nonsuit was proper; the contract still operating; and

Refused the Rule (*c*).

(*a*) The name of the case was not mentioned at the bar. *Qu.* Whether it were *Mr. Keck's* case at *Oxford*, 1774, *Bull. N. P.* 139.? or *Harris v. Oke* at *Winchester* Sum. Ass. 1759, *cor. Lord Mansfield*, *ib.*? which bear upon this point.

(*b*) *Dougl.* 23.

(*c*) *Vide Weaver v. Boroughs*, 1 *Str.* 648. and *Towers v. Barrett*, 1 *Term Rep.* 133.

BILLETT *against* M'CARTHY.

Monday,
Feb. 1st.

THE last Insolvent Debtors' Act of the 41 *Geo. 3. c. 70.* contains a clause (*s. 4.*) in the usual form; whereby "all and every person and persons, who on the first day of *March* 1801 were charged in any prison or gaol for the non-payment of any debt or debts, sum or sums of money, which did not in the whole amount to a greater sum then 1500*l.*, and whose name or names shall be inserted in any such list to be delivered in as aforesaid; taking the oaths, &c. and shall perform on their part what is required to be done by the Act; shall as to his person and effects respectively be for ever released, discharged, and exonerated to such extent, and in such manner as is therein-after provided, and no otherwise." By *s. 5.* (a new clause) "Any person who on the said 1st of *March* 1801 was charged in any prison or gaol or in custody of any keeper or gaoler of a prison or gaol, for the non-payment of any debt or debts, or sums of money, not exceeding, &c. and who shall have been discharged by any creditor or creditors, without the consent of such debtor after the [149] said 1st of *March*, and before the passing of this Act, may nevertheless take the benefit thereof, &c. in like manner as if

One who was arrested at the suit of the plaintiff, and liberated on bail prior to the 1st of *March* 1801, and was afterwards committed in execution at the suit of the same plaintiff before the passing of the Insolvent Act of the 41 *G. 3. c. 70.* is entitled to be discharged by the 6th section of that Act on the conditions thereby imposed. And this, where he was so taken in execution upon a judgment confessed

for the amount of the cost as well as for the original debt, for which he had been arrested by writ out of an inferior Court before the 1st of *March*; the 34th section providing that no person entitled to the benefit of the Act should be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of *March*.

1802. "he were in custody at the time of passing this Act: provided
 BILLETT "any such person shall petition, &c. and give notice," &c.
 against Then the 6th section (also a new clause) provides "that if any
 M'CARTHY. "person shall have been or shall be committed to any goal or
 "prison, or to the custody of any keeper or goaler of any goal
 "or prison respectively, *at any time before the passing of this*
 "*Act*, for any debt or debts, sum or sums of money, for which
 "he or she shall have been *imprisoned*, at any time before the
 "said first day of *March* 1801, and at the suit of the same
 "plaintiff; then and in such case every such person shall be
 "entitled to all the benefits of this Act, and be deemed and
 "construed to be within all and every the provisions thereof,
 "in like manner, in every respect, as if he or she had been
 "charged in any prison or goal, and was actually imprisoned
 "or in custody on the said first day of *March* 1801," &c. This
 Act was passed on the 27th of *June* 1801.

The short facts of the case, so far as they are material to
 be stated, were these: The defendant, being indebted to the
 plaintiff in 50*l.* on a bill of exchange, was arrested on a writ
 out of the Palace Court for the debt, in *October* 1796, and gave
 bail; and after some proceedings, the defendant signed a cog-
 novit, with a stay of execution on certain terms then agreed
 on. These terms not having been complied with, judgment
 was entered up, and other proceedings were had against the
 bail without effect; and in *February* 1801, it was finally agreed
 that the defendant should give the plaintiff a warrant of at-
 torney to confess judgment, which was accordingly given, for
 [150] 97*l.* including the original debt and costs, of which 15*l.* 15*s.*
 was to be paid on the 20th of *March* 1801, and the remainder
 by weekly instalments. The first instalment was paid at the
 time; but the defendant afterwards making default, judgment
 was entered up against him on the 28th of *March*, and he was
 arrested on a *ca. sa.* and on the 12th of *June* 1801, was com-
 mitted to the custody of the warden of the Fleet, and gave
 notice of his intention to take the benefit of the last Insolvent
 Act, at the last *October* Sessions in *London*, when he was dis-
 charged. It also appeared by the defendant's affidavit, that he
 had been arrested and imprisoned at the suit of one *G.*
McGuaran, in *Michaelmas* vacation 1800, for a certain debt,
 to which he had put in bail, and that he had been, *before* the
 passing of the said Insolvent Debtors' Act, committed to the
 Fleet

Fleet in execution in the same action. But it did not appear that he was in custody on the 1st of *March* 1801.

The plaintiff thereupon obtained a rule calling on the defendant to shew cause why the plaintiff should not renew the ca. sa. issued on the judgment in this cause, and retake the defendant. This was at first attempted to be supported on the ground of fraud in the defendant in obtaining his discharge; but finally the question was resolved into the construction of the Act of Parliament.

Erskine and *Marryat* shewed cause against the rule, and contended that the defendant's case came within the 6th section of the Act: and that the sum for which judgment was entered up, and execution taken out being compounded, as well of the costs as of the original debt for which he had been in custody upon the arrest, before the 1st of *March*, made no difference; neither was it material, that the first instalment was agreed to be taken after that period; being debitum in presenti solvendum in futuro. And they relied on the 34th section, which enacts, "that no person entitled to the benefit of the Act "should thereafter be imprisoned by reason of any judgment "or decree for payment of money only, or for any debt, "damages, or costs, sum or sums of money contracted, incurred, occasioned, owing or growing due before the said 1st "of *March* 1801," &c. and they referred to *Cotterell v. Hooke* (a), where it was taken for granted that a bond for securing an annuity which had become forfeited before the day named in an Insolvent Act, on which the defendant was discharged, was thereby gone, although the party might still be sued for subsequent breaches upon a covenant for securing the same annuity.

Garrow contra said, that by the very terms of the 34th section, no person could avail himself of it who was not entitled to the benefit of the Act; and therefore the question still reverted to this, whether on the construction of the antecedent clauses the defendant was so entitled? That the word made use of in the 6th section, which was relied on, is *imprisoned*, which means an actual commitment to prison, and not merely an arrest on mesne process, on which the party is bailed. That the object of the Act being humanity and not justice, it might

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(a) *Dougl.* 97.

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fairly be considered as the intention of the Legislature to make that distinction between those who were in a condition to liberate themselves on bail, and were therefore only constructively imprisoned, and such as were actually confined in prison. If the former had been meant, the phrase would have been "arrested and bailed," instead of "imprisoned." Besides the warrant of attorney constituted a new debt, for which he was not liable till the 20th of *March*, when the first instalment became due; and therefore the 6th section of the Act does not apply to this case.

GROSE, J. (*a*) Whatever doubts I entertained at first, considering that the last Insolvent Act confined the description of the objects to be benefited by it to the 4th clause, as prior Acts had done; yet upon referring to the new provisions in the 5th and 6th clauses, I am satisfied that the defendant's case falls within the latter. I consider that he was a person *imprisoned*, within the meaning of the Act, before the 1st of *March* 1801, having been arrested at the suit of the plaintiff for this debt, and obliged to give bail. We ought to give as large and beneficial a construction as the words will admit of, in furtherance of the intention of the Legislature. The very alteration in the wording of the several clauses confirms this construction; for the 4th and 5th clauses speak of persons "charged in any "prison or gaol, or in the custody of any keeper or gaoler of "any prison or gaol." Then the 6th clause expressly marks the difference; for it speaks first of any person "committed to "any gaol or prison," &c. at any time before the passing of the Act for any debt for which he shall have been *imprisoned* at any time before the 1st of *March*. The word *imprisoned* is of much larger signification than the former description: therefore I think that the Legislature meant to extend the benefit of the Act to persons, who, having been arrested for any debt before the first of *March*, were after that time, and before the passing of the Act, committed to prison at the suit of the same plaintiff for such debt. Such I think was the situation of this defendant; and if he were entitled to be discharged under the Act, it is unnecessary to enter into any formal question as to the mode in which his discharge was obtained.

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(*a*) Lord *Kenyon*, C. J. who was present when this case was first agitated on a former day, was now absent from indisposition, and continued so during the remainder of the Term.

LAWRENCE,

LAWRENCE, J. The general question on the construction of the Act is now the only one to be considered; upon which I agree that a person arrested, and giving bail before the 1st of *March* for a debt before then due, is to be considered as *imprisoned* within the true construction of that word in the 6th clause. That this was the meaning of the Legislature is very apparent, upon comparing that clause with the fourth. The general object was to enable debtors to get discharged out of custody upon giving up their effects to their creditors: but it was necessary in so doing to guard against improper practices; and therefore, by the fourth section, the benefit is confined to persons actually charged in prison for debt on the 1st of *March* 1801. And by the sixth section it is extended to persons actually committed to prison before the passing of the Act, provided they were imprisoned before the 1st of *March*; evidently, therefore, looking to the case of persons who had been bailed out in the intermediate time, and who were therefore not in actual custody on the 1st of *March*. One arrested and bailed may to all intents and purposes be said to have been imprisoned.

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LE BLANC, J. We ought to construe the words of the Act liberally, in order to effectuate the intent of the Legislature; which was that persons in custody for debt should be discharged on certain conditions. The Act provides for three descriptions of persons; 1. Those who were charged in any prison or gaol on the first of *March* 1801, and so continued till the passing of the Act. 2. Those who were so charged on the 1st of *March*, but were discharged without their consent by their creditors after that day, and before the passing of the Act. And 3. Those who having been arrested before the 1st of *March*, though not in actual custody on that day, shall afterwards have been committed in actual custody for any debt at the suit of the same plaintiff before the passing of the Act. The different manner of wording the several clauses warrants the opinion that the Legislature looked to the difference contended for; for in the former part of the 6th clause they speak of persons "*committed to any gaol or prison*," and in the latter part they change the description to persons who shall have been *imprisoned* before the 1st of *March*. Now it is plain that one who has been arrested, though for ever so short a space of time, and giving bail, by whom he is liable at any time afterwards to be retaken again,

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comes within the description of a person who has been imprisoned; and then the case is brought expressly within the 6th clause.

Rule discharged.

Monday,
Feb. 1st.

PINDAR against WADSWORTH.

A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a farthing: at least the smallness of the damage found is no ground for a nonsuit.

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THIS was an action on the case by a commoner against a stranger for injuries to his right of common.

The first count of the declaration stated, that the plaintiff was possessed of a certain messuage and land, &c. in the parish of *Bambrough* in the county of *York*, by reason whereof he was entitled to have common of pasture on a certain waste called *Bambrough Common*, for all his commonable cattle levant and couchant, at all times of the year; and that the defendant knowing the premises, but *contriving to injure him and deprive him of the advantage of his said common, &c. wrongfully carried from off the said common and converted to his own use so many loads of manure and dung, which before, &c. had been dropped and made on the said common by the cattle from time to time feeding thereon, and which ought to have remained there for the purpose of nourishing and increasing the herbage there; whereby the said common and the herbage thereof were then and there greatly impoverished for want of the said manure and dung which would otherwise have remained on the said common and increased the herbage and grass thereof; and thereby the plaintiff during the time aforesaid could not use the said common of pasture upon the said common in so beneficial a manner as he ought to have done, and would otherwise have done, &c. and his said right of common by means of the premises has been greatly lessened in value, &c. The second count was for injuriously causing to be placed and made so many heaps of dung and manure upon the said common, and wrongfully continuing the same for a long time, &c. whereby the plaintiff during that time was obstructed in the said common of pasture, and could not enjoy the same in so ample and beneficial a manner as he otherwise might have done, &c. The third count was for a common trespass.

At the trial at *York*, before Lord *Alvanley*, it appeared that the plaintiff had a right of common upon the waste in question,

and turned his cattle thereon. That the defendant, who farmed two acres of land of the plaintiff adjoining the common, had made a practice for a long time before the action brought of gathering up the dung from the common and carrying it off in baskets and wheelbarrows for sale. That he and others had been frequently warned against this practice, but without effect, though the defendant had often promised not to repeat it. The common was between two and three hundred acres in extent, and the lordship of the manor was disputed by several claimants. For the defendant it was insisted, that as each of the commoners (of whom it was said there were 42) had an equal right to bring an action, and as the injury, if any, was so trifling, the action would not lie; and the plaintiff ought to be nonsuited. In support of which were cited *Robert Mary's* case (a), *Bull. N. P.* 120. and a case of *Rigg v. Parsons* before *Chambre, J.* at the last *Lent* assizes for the county of *Lancaster*; where in an action on the case in the nature of waste the learned Judge was stated to have said that in analogy to the action of waste, in lieu of which the present form of action was substituted, unless the damages found amounted to 3s. 4d. the plaintiff could not have judgment. Lord *Alvanley* however refused to nonsuit the plaintiff, but left it to the jury to say whether the plaintiff had sustained any and what damages: and they found a verdict for him on the first count with one farthing damages. In *Michaelmas* Term last a rule nisi was obtained for entering a nonsuit.

On that occasion Lord *Kenyon, C. J.* (who was not present in court on this day) said, that this had been vexata questio for two centuries past. That Lord *Coke* was of opinion that a commoner could not maintain such an action without shewing that he had sustained an actual injury. And in a case which he remembered to have occurred, when he was at the bar, where the lord of the manor had given leave to Mrs. *Lessingham* to build a cottage on the waste at *Hampstead*, for which an action was brought by a commoner, Lord *C. J. De Grey* was of the same opinion. That he himself could not then understand why the smallness of the damage could make any difference in point of law: but when he found that the learned Judge had grounded his opinion on the authority of Lord *Coke*, he submitted his judgment to theirs.

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(a) 2 Co. 115.

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Lambe now shewed cause. No question can arise in this form of action on the *amount* of the damage, but only whether *any* damage were sustained by the plaintiff: that was properly left to the consideration of the jury, and they have found the fact for him. It also appears that the defendant was a wilful wrongdoer, having persisted in doing the injury complained of for a long time, and after notice to desist; and is therefore not entitled to favour. If he had a right to do the act, all the world have the same right. It was left to the jury to say whether this were a substantial deterioration of the common; and the decision of that fact with the plaintiff decides the case; for if the common were deteriorated, all the commoners who used the common must sustain an injury. It cannot be denied that acts of this nature must impoverish the common. It can make no difference whether the manure dropped from the cattle on the common, or was put there purposely by the commoners: and then it must follow, that if this action will not lie, no action would lie for taking away the manure in the other instance. Mrs. *Lessingham's* case before Lord C. J. *De Grey* did not pass without disapprobation at the time: but there the cottage was built on the common by leave of the lord, which might vary the consideration. At any rate that case was ruled prior to the determination in *Wells v. Watling (a)*, where it was settled that an action on the case lay for a surcharge of the common, although the plaintiff had not turned on any cattle of his own at the time of the surcharge. And *De Grey*, C. J. said, it is sufficient if the plaintiff's *right* be injured, whether it be exercised or not. *Gould*, J. said, that he had always thought the doctrine of Lord *Coke* in *Mary's* case (*b*), that there must be a loss of the common in order to maintain this action, a singular doctrine of his own, and no part of the judgment of the Court. And that it appeared from 2 *Brownlow*, 140. that an action lay for this damage be it ever so minute. *Blackstone*, J. observed that any act which would ground a *per quod*, and lessen the profit of the common, would support an action against the commoner. Now the profit may be lessened as well by taking away that which contributes to produce the grass, as by eating it when produced. *Nares*, J. referred to the case of the *Tunbridge Wells* dippers (*c*), to shew that a probable damage was a sufficient injury to ground

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(a) 2 *Black. Rep.* 1253.(b) 9 *Co.* 113.(c) 2 *Wils.* 422.

an action. In the last-mentioned case it was impossible to prove any specific damage suffered by any individual dipper by the interloping of a stranger: but the Court said it was an injury to all who were interested. Then if so, it must necessarily be an injury to each. Then came the case of *Hobson v. Todd* (a), in which all the former cases were considered: and there it was determined that one commoner could maintain an action on the case against another for a surcharge, although he himself had also surcharged the common, and consequently had had more enjoyment of it than he was entitled to. There *Buller, J.* expressly disclaimed any consideration of the smallness of the damages; and said, the only question was, Whether *any* injury had been done by the defendant to the plaintiff? The defendant, he said, was a wrong-doer, and the plaintiff was entitled to the action without proving any specific damage. He also observed, that there was another ground on which the action might be supported, namely, that the *right* was injured. And that if a commoner could not maintain such an action because his own cattle had grass enough, he must permit a wrong-doer, like the defendant, to gain a right by the length of possession. It was said at the trial, that the lord might bring the action, but not a commoner, in order to prevent a multiplicity of actions; but that is no objection where the injury is done to many, as in this case. The same might be urged against an action by one commoner against another for surcharging the common, which lies without dispute. So, if any commoner build on or inclose the common (b). Besides, the lord may collude with another, and refuse to bring the action; or, as in the present case, the property of the manor may be disputed.

Barrow contrà endeavoured to support the rule on three grounds; 1. because of the exility of the damage, of which the law would not take notice in order to support an action; 2. to avoid multiplicity of actions; 3. to avoid circuity of action. 1. *Mary's* case (c) is in point, that for every feeding by the cattle of a stranger the commoner shall not have an assize nor an action on the case; but the feeding ought to be such *per quod* the commoner could not have common of pasture for his cattle, but *proficuum suum inde per totum idem tempus amisit*. So that if the trespass be so small as that he has not any loss, &c.

(a) 4 Term Rep. 71.

(b) Vide 1 Roll. Abr. 89, pl. 3 & 405. and

2 Leon. 203.

(c) 9 Co. 113.

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he shall not have an action for it; but the tenant of the land may in such case have an action. Here the damage is only estimated at a farthing. And by analogy to the old action of waste, as the damage does not amount to 3s. 4d. the plaintiff is not entitled to judgment. This rule was holden to apply to an action on the case in the nature of waste, by *Chambre, J.* in *Rigg v. Parsons* before-mentioned; to which the present action bears great affinity. And it is supported by *Bull. N. P.* 120. and *The Keepers and Governors of Harrow School v. Alderton (a)*, where all the cases on this subject are collected. Then if the defendant would be entitled to judgment on this finding, it goes to the cause of action, and will sustain the present application to enter a nonsuit. 2. If this be such an injury for which an action lies by one, it is equally maintainable by all the commoners respectively, which will lead to a multiplicity of suits: to avoid which the law gives the action, if at all, to the lord only. Where the injury is small and common to a great many, none of them shall have an action, according to *Williams's case (b)*; as for non-performance of divine service in a manerial chapel; for nuisances in highways, &c. And this agrees with *Mary's case (c)*, before-mentioned, in which is cited *Buttolph v. Kipping, H. 5. Jac. 1.* in *C. B.* 3. The Court will enter a nonsuit in this case to avoid circuity of action. For by the stat. 22, & 23 *Car. 2. c. 9. s. 136.* for the prevention of trivial and vexatious suits, in all actions of trespass, assault and battery, and other personal actions, where the judge shall not certify that the freehold or title of the land mentioned in the declaration was chiefly in question, the plaintiff, in case the verdict is under 40s., shall not recover more costs than damages, &c. "and the defendant may have his action against the plaintiff for such vexatious suit, and recover his damages and costs," &c.

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GROSE, J. It was properly left to the jury to say whether any damage were sustained by the plaintiff, and they have found that there was damage. It is true that the amount is but trifling: but the defendant appears by the evidence to have been a very perverse tortfeasor; for he persisted in taking the manure from off the common again and again after repeated warnings to abstain. Then the only question is, Whether a man cannot main-

(a) 2 *Bos. & Pull.* 36.

(b) 5 *Co.* 72. *b.*

(c) 9 *Co.* 113. *a.* and vide 1 *Brownl.* 197.

tain an action against another for doing that which is an undoubted injury to him as well as others, because the amount of the individual damage is proportionably small. But it is said that a commoner cannot maintain an action for a trifling damage done to the common, but that the lord alone shall have the action. I know not how that remedy is to be obtained in this case; for it appears by the report that the ownership of the manor is at present uncertain, being claimed by several persons: and can it be contended that wrong-doers may continue to commit torts upon the commoners with impunity till the title of the lord can be ascertained. It is true that in *Mrs. Lessingham's* case Lord C. J. *De Grey* rather inclined against the action: but I well remember that many eminent persons of the profession did not approve of that doctrine: and I also know, that in the case of *Wells v. Watling* Mr. Justice *Gould* was decidedly of a different opinion; and questioned the doctrine of Lord *Coke* in *Mary's* case: and in the case *Hobson v. Todd*, Mr. Justice *Buller* was clearly of opinion, that the smallness of the damage was no bar to the action by the commoner; but that the question was, Whether *any* injury had been sustained by him? That indeed was the case of a surcharge by a commoner; but the principle is the same: and I remember an argument urged by the last-mentioned Judge, which weighed very much with me; that if a commoner could not maintain an action of this sort, a mere wrong-doer might by repeated torts in course of time establish evidence of a right of common. The jury having found that the plaintiff has in fact sustained a damage, I do not see how we can say that the action is not maintainable; or by whom else it is to be maintained if not by him. Then it is urged, that if one commoner may maintain an action, all the rest may, which will lead to a multiplicity of suits. The plain answer is, that if a man will commit an injury to many instead of one, he must make satisfaction to all; and it does not lie in his mouth to say, that because he has injured the rights of many, therefore he shall make reparation to none. On the contrary, the more extensive the injury, the more ought he to be bound to make compensation.

LAWRENCE, J. This matter comes on upon a rule for leave to enter a nonsuit; and therefore the last objection urged against the verdict, so far as it arises upon the stat. 22 and 23 *Car.* 2. c. 9. does not apply; because that statute supposes that the

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plaintiff may maintain the action; but in case the damages recovered are under 40s. and the Judge does not certify, it gives the defendant a remedy for such a vexatious suit by action. However it has been generally supposed that that statute only relates to actions of trespass (*a*). Then it is objected, that the maintenance of the action would tend to a multiplicity of suits: but if there were any weight in that argument, it would also go to shew that no action could be maintained by a commoner for any injury, however serious, done to his right of common; as if a stranger had driven a herd of cattle on the common, and kept them there for a month; because it might be said that if one action of this sort were maintainable, each of the commoners to the amount of forty-two would have the same remedy against the wrong-doer: but that is clearly otherwise. Then the objection is resolvable into this, that the amount of the damage sustained is too small to support an action. But all the cases which have been cited only go the length of shewing that if the commoner cannot prove damage sustained by him in consequence of the wrongful act of the defendant, the action will not lie. For if he have not been prejudiced, he cannot be entitled to reparation. Whereas here the jury have found damage sustained by the plaintiff, though but to a small amount; therefore he has made out that which is the ground of this action; and if so, the smallness of the damages can be no reason for entering a nonsuit. However, the opinion I have delivered is without prejudice to any objection in arrest of judgment.

LE BLANC, J. The only grounds for making the rule absolute must be either, that no action lies by a commoner for such an injury, however great the amount; or that the damage sustained in the particular case is too small to support an action. Here the plaintiff was bound to shew that he had sustained some damage; for he was only entitled to recover to the extent of the damage sustained by him. Then can it be contended, that taking away *all* the manure from off the common would not prejudice the commoners? And if so, the defendant having taken away so much, that constitutes a damage. Then the jury have ascertained the extent of the damage sustained by this plaintiff at a farthing. Therefore the act done by the defendant being injurious to the common, and the extent of the injury

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(a) Vide 2 *Tidd's Pract.* 373.

done to the individual commoner having been ascertained, there can be no reason because of the smallness of the damages for entering a nonsuit. The decision in the case of the keepers, &c. of *Harrow School v. Alderton (a)* was made with reference to the old doctrine in actions of waste, whereby the thing wasted is to be recovered as well as damages,

Rule discharged.

(a) 2 Bos. & Pull. 86.

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The KING against the Inhabitants of WOODLAND.

Wednesday,
Feb. 3d.

AT the Quarter Sessions at *Lancaster*, *John Woodburn* appealed against a rate made for the relief of the poor of the townships or divisions of *Woodland*, *Heathwaite*, &c. within the parish of *Kirby Ireleth*. The Court confirmed the rate as to the several sums assessed upon the appellant for his lands and woods (a) and as to the several sums assessed upon him for his *slate-works*, the Court (being of opinion that the appellant ought not to be rated for his *slate-works*) amended the rate by expunging the same; subject to the opinion of this Court on the following case:

A slate-work,
(or as improperly called
a slate-mine)
is rateable to
the poor.

The appellant is the occupier of certain slate quarries in the said township. The working of such quarries is attended with great expence and risk, and is considered always as a matter of uncertainty and speculation. The outward surface of the country when the soil is taken off is generally a sort of rock composed of slate mixed with coarse stone, which is very hard, and not at all proper for splitting slates. Some idea may be formed by skilful persons whether the proper kind of slate may be found below. The process adopted for procuring slates is first to remove the soil, and then to blast the coarse outward rock by means of gunpowder. Sometimes a good vein of pure slate is discovered. But it has often happened that works have been carried to the depth of thirty yards at the expence of some hundred pounds without meeting with any. The best slate is at the bottom of the quarries, many of which are upwards of fifty

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(a) The relative sums assessed were as follows; for the lands 3*l.* 9*s.* 6*d.* for the woods 1*s.* 9*d.* and for the slate-works the several sums of 2*l.* 2*s.* 6*d.* and 1*l.* 5*s.*

yards

1802. yards deep. A good vein when found may last for some years :
 The KING at other times the veins are soon worked out. A shaft is never
against sunk, as in coal-pits, the quarries being commonly worked by
 The Inha day-light; though a level has been known to be driven one
 bitants of hundred yards under ground. When the pure slate is found,
 WOODLAND. large blocks are detached by means of gunpowder, which
 are afterwards split by iron tools or gunpowder into thin
 pieces of merchantable slate. These ought not to be thicker
 than half an inch, and are more valuable according to their
 lightness. It is so difficult to procure pieces of sufficient size
 and of the proper thinness, that for one cart-load of merchant-
 able slates it is usual to be encumbered with forty cart-loads of
 refuse slate of no value, though of the pure sort of slate, being
 too small for use. When quarries are opened in the waste, a
 rent is sometimes paid to the lord for a certain district: some-
 times he receives a sum of money for every ton of slate procured.
 In the inclosures a rent is generally paid for the land. The slate
 mines have never before been rated.

[166] *The Attorney-General and Raincock* in support of the order
 of Sessions. It is agreed that mines in general are not rate-
 able to the poor within the stat. 43 *Eliz. c. 2.* and that the men-
 tion therein of coal-mines is not by way of example, but in ex-
 clusion of all other mines, according to the maxim that exceptio
 minus est exclusio alterius. Upon this principle lead-mines were
 holden not to be rateable (*a*). The only cases in which this
 species of property has been determined to be rateable, have
 been where there was no risk or uncertainty; as in *Rowls v.*
Gell (*b*), where the lessee of lead-mines received certain profits
 called lot and cope from the adventurers who worked the mine,
 without any risk or expence on his part. Or as in *R. v. St.*
Agnes (*c*), where the owners of fee farm of tin and toll tin were
 deemed rateable for such profits. But here the case states,
 that the mines are worked at great expence and risk. The
 only authority which bears hard against the appellant is that of
Rev. v. Altherbury (*d*), where lime works were adjudged to be
 rateable. But the working a slate mine is more a matter of
 science and adventure than conducting a lime-work. The lime-
 stone is found near the surface, and is applied to use as it is dug
 up, and no skill is required to prepare it for market; in all

(*a*) *The Governor and Company for smelting down Lead, &c. v. Richardson and others*, 3 Burr. 1541.

(*b*) *Cowp.* 451.

(*c*) 3 Term Rep. 480.

(*d*) *Ante*, 1 vol. 551.

which particulars it differs from the present subject-matter, which may more properly be considered in the nature of a mineral, and comes within the general exception as to mines.

Wood and Hornby contra were stopped by the Court.

GROSE, J. The only ground on which it is contended that the subject-matter is not rateable is, because it is denominated *a mine*: but though that word has slipped in at the end of the case, yet it cannot alter the nature of the thing, which is nothing more than a slate-work, and no mine in the proper sense of the word. Then how is it possible to distinguish a slate-work in this respect from a lime-work, which has been determined to be rateable? The express mention of coal-mines in the statute has been holden to be an exception of other mines; but there cannot be a doubt but that a slate-work, not being a mine, and producing profit, ought to be rated. And the case expressly distinguishes between the annual value of the slate-works, and of the lands which were separately assessed for their respective values.

LAWRENCE, J. I consider the case of *Rex v. Alberbury* as having decided this point: but if this be a mine, the subject-matter in that case was improperly described. In truth however neither lime nor slate-works can be deemed to be mines, in the sense in which they were construed in the case of *Rex v. Richardson* to be virtually excepted out of the stat. 43 *Eliz.* For Lord *Mansfield*, speaking of such mines, confines the exception to such as are governed by particular laws of their own; like those in *Devonshire*, *Corwall*, and other counties, the ownership whereof is exercised in a different manner from that of the soil. And this he considers might be a reason why they were not named in the statute. Now that part of his argument is totally inapplicable to the present case. But if every substance which is raised from under the surface of the soil is to be considered as the produce of a mine, and therefore that the profits of it are not rateable, the exception will equally extend to gravel, sand, marle, stone, and the like; none of which were ever considered as the produce of mines.

LE BLANC, J. This case is within the principle of the decision in *Rex v. Alberbury*, and is not within the virtual exception of the stat. 43 *Eliz.*

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Order of Sessions quashed.

The

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An appointment of one overseer alone for a township is bad in law; the stat. 13 & 14 Car. 2.

c. 12. requiring at least two: and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 & 9 W. S. c. 30. which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers where there are no churchwardens."

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TWO justices by an order removed *J. Hollis*, his wife and children by name, from the township of *Clifton* to the township of *Yieldersley*, both in the county of *Derby*. The Sessions on appeal quashed the order, subject to the opinion of this Court, on the following case:

R. Hollis, the father of the pauper *J. Hollis*, in the year 1780 went with his family to reside at *Yieldersley*, under a certificate dated the 18th November 1780, under the hand and seal of *J. Warrington*, only overseer of the poor of the township of *Sturston* in the parish of *Ashborne* in the said county, and duly allowed by two justices, acknowledging the said *R. H.*, *Hannah* his wife, and *Joseph* their child (the pauper) to be inhabitants legally settled in *Sturston*. The said *R. H.* with his family resided at *Yieldersley* under the said certificate about a year, when he returned to *Sturston* with his family, except the pauper *Joseph*, who was then only two years old, who was left with his grandfather in *Yieldersley*, with whom he resided till he was sixteen years old, when he was hired and served a year in *Yieldersley*. The parish of *Ashborne* consists of five townships, viz. *Yieldersley*, *Sturston*, *Clifton*, *Offcote*, and *Ashborne*. The townships severally maintain their own poor, and have separate and distinct overseers. The parish of *Ashborne* has two churchwardens, who are appointed for the parish at large. At the * time of granting the above certificate, *J. Warrington* was the only overseer appointed for the township of *Sturston* during that year. There has been generally only one overseer appointed for the township of *Sturston*; though in some few instances there have been two. There has always been a sufficient number of inhabitants to have appointed two overseers.

Balguy and *Clarke* in support of the order of Sessions. The question is, Whether, there having been but one overseer appointed for the township of *Sturston* at the time, a certificate made by that one be not binding on the township? or in other words, Whether the township be not estopped from disputing the legality of it in this mode of proceeding? It was contended below, first, that the churchwardens of the parish of *Ashborne* in which this township is situated, ought to have joined in granting

ing the certificate. That might have been necessary under the stat. 43 *Eliz. c. 2. s. 1.* compared with the Certificate Act 8 & 9 *W. 3. c. 30.* if this had been a certificate granted by the parish at large; because by the former statute “the churchwardens of every parish, together with 4, 3, or 2, substantial householders there,” are appointed overseers of the poor; and by the latter statute, the certificate is to be “under the hands and seals of the churchwardens and overseers of the parish, township, or place, or the major part of them,” &c. But this is not the case of an overseer appointed under the statute of *Elizabeth*, but under the stat. 13 & 14 *Car. 2. c. 12.* which directs the appointment of overseers only for every township in a parish which is too large to reap the benefit of the stat. 43 *Eliz.*; and the stat. 8 & 9 *W. 3. c. 30.* goes on to provide that the certificate shall be under the hands and seals “of the overseers, where there are no churchwardens (a).” Now here there were no churchwardens of the township of *S.*, as there can be none appointed for such a district; though there were churchwardens for the parish at large, which contained this and other townships within its limits. But the churchwardens for the parish at large cannot, as such, be within the meaning of the Certificate Act 8 & 9 *W. 3.* as applied to a township, though included within the limits of their appointment; for they have nothing to do with the government or maintenance of the poor in such township, and consequently cannot be supposed to have cognizance of the fact which they would be required to certify. Besides, it might so happen that a churchwarden appointed for the whole parish in which the townships of *A.* and *B.* were situated, and living in *A.*, might be interested in certifying that a pauper was settled in *B.* in order to exonerate his own particular township. Whereas the weight due to the truth of a certificate is founded on the presumption that the officers executing it will not certify a fact in their own wrong. Secondly, admitting that an original appointment of one overseer only would be bad, and that in a direct proceeding for that purpose the appointment might be quashed; yet no objection can be taken in this collateral manner to any act done by such single overseer. If two had been originally appointed,

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(a) Also by the stat. 17 *Geo. 2. c. 38. s. 15.* “In every township or place where there are no churchwardens, the overseers alone may act in all respects as churchwardens and overseers may do in other places by virtue of this or any former Act.”

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and one had died, a certificate signed by the survivor, or any other act done by him, would have been valid. Then how can a foreign parish or township be apprised* of the invalidity of the certificate upon the face of it? or how can they take cognizance of an original defect in the appointment of the overseer? To permit the township granting the certificate to take such an objection would be to let them take advantage of their own laches. If they who were most concerned thought proper to acquiesce in a defective appointment, a third and an innocent township ought not to be prejudiced by it. As to all third parties, it is enough that the person acted de facto as overseer, and that the certificate was signed by a majority of the existing overseers: the statute of King *William* requires nothing more. This reasoning is confirmed by the cases as far as they go. In *Rex v. Besland* (a) the Court refused to quash an order of justices appointing *one* overseer: because they need not all be appointed by one instrument (b); and non constat that others had not been appointed by other orders. In *Rex v. Loxdale* (c) an appointment of five overseers was quashed, being a greater number than was warranted by the stat. 43 *Eliz.*, which Lord *Mansfield* observed was in a *descending* ratio, 4, 3, or 2, and not the reverse; which he said pointed out to demonstration what the Legislature meant; which was that the number should not exceed four. These however were cases where the validity of the appointment was directly in judgment. But in *Rex v. Wymondham* (d), the same point arose collaterally upon a question of settlement. There a certificate had been signed by two churchwardens and four overseers of *W.*; but the case stated, that it had been usual to appoint four churchwardens and eight overseers in that parish, there being several divisions in it, though the poor were maintained by one general rate. An appointment therefore of a less number than usual was certainly invalid. But Lord *Kenyon* said, that if the certificate were signed by a majority of the parish officers *de facto*, as contradistinguished from such officers *de jure*, it would be valid.

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Gibbs and *Torkington* contra. 1st. The words of the stat. 8 & 9 *W. 3. c. 30.* are positive, that the certificate shall be made

(a) 1 *Const.* 15. S. C. and 1 *Burr.* 416. in marg.

(b) Vide *Rex v. Morris*, 4 *Term Rep.* 550. to the same purpose.

(c) 1 *Burr.* 445. 3 *Burn's Just. tit. Poor—Overseers* (321). S. C.

(d) 6 *Term Rep.* 552.

by the churchwardens *and* overseers, or the major part of them; or where there are no churchwardens, then by the overseers. It matters not therefore whether the overseers be appointed under the statute of *Elizabeth* or under that of *Car. 2.*; because the Certificate Act does not require the concurrence of all these officers *as overseers* merely, in which character the management of the poor is committed to them by the statute of *Elizabeth*; but it requires their concurrence *quâ churchwardens*, as well as overseers: under the Certificate Act therefore it is not necessary that the churchwardens should be overseers. Then there being churchwardens for the whole parish, their jurisdiction must necessarily extend throughout the townships into which it is divided, and they must consequently be churchwardens for every part of it: in which case the certificate appears to be void on the face of it. 2dly, It is clear from the cases referred to, that an appointment of one overseer alone for a township (which is the fact here found), is bad, even under the stat. 13 & 14 *Car. 2.*, and consequently that the certificate in this case not having been made according to the directions of the statute of *William*, which requires it to be executed by the overseers where there are no churchwardens, (or at least by the major part of them) is absolutely void. But it is contended that no advantage can be taken of the illegality of such appointment in this collateral way: but it would be most strange and incongruous to say that a person, however illegal and void his appointment to an office, should yet have the power of binding the township by his acts, against perhaps the consent of the major part by whom his appointment may be resisted. The certificated township were not bound to receive the persons named in the certificate unless it were legally executed: and they were bound to look to that at their peril. It cannot be pretended that a certificate given by one who merely acted as overseer without any appointment at all would be of any effect: or if not executed by a majority of the proper officers. Then if the parties interested must inquire of those facts, why not of the legality of the appointment of one: especially where the presumption of law is, that there are more overseers than one.

GROSE, J. The question is, Whether the certificate granted by one overseer can be good? First, considering it as a certificate given by an overseer appointed under the statute 43 *Elizabeth*, it cannot avail; because the statute of King *William*, to which

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which it must conform, directs, that it shall be made by the churchwardens and overseers, or the major part of them; or where there are no churchwardens, by the overseers: and by the statute of *Elizabeth*, the churchwardens and not less than two substantial householders are required to be nominated overseers. Now this certificate was not granted by either one or the other of those descriptions of persons. Then see if it can be supported as a certificate given by a township under an appointment by virtue of the stat. 13 & 14 *Car.* 2.; for it is of great importance to take care that a certificate which is to be binding on the inhabitants of the township is properly given in the manner prescribed by law. That statute expressly requires that in every township of any parish which cannot reap the benefit of the stat. 43 *Eliz.* “there shall yearly be appointed *two or more* overseers,” &c. Then if the township claim the benefit of the Act to appoint its own overseers, it must adhere to the direction of the Act, and appoint not less than two overseers. And there is a good reason for requiring the concurrence of the proper officers in these instances: because it is a discretionary act which is to bind the inhabitants; and if the proper number of overseers had been appointed, the inhabitants would have had the benefit of their consideration (which the statute intended to give them), whether this were a proper certificate to be granted. Therefore the stat. of *Car.* 2. having required that not less than two overseers should be appointed for a township, and the statute of King *William* having required the certificate to be executed by the overseers where there are no churchwardens, and there having been but one overseer appointed for the township, by whom this certificate was granted, I am of opinion that it was void.

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LAWRENCE, J. Two questions have been made, 1st, Whether the churchwardens of the parish at large should have joined in granting the certificate? 2. Whether a certificate made by one overseer of a township, where there is only one appointed, be good? As to the first, there is no necessity for entering into it on this occasion. If there had been, I should have thought that what had been urged by the counsel in support of the order of Sessions was very material. And I believe it has not been usual for the churchwardens of the parish at large to join in granting certificates with the overseers of particular townships within it maintaining their own poor. However it will be sufficient

ficient to determine that question when it necessarily arises, which is not the case here; because I think that this certificate was at any rate bad, having been granted by only one overseer, who was alone appointed for the township of *Sturston*; whereas the stat. 13 & 14 *Car.* 2. expressly requires two to be appointed for every township; and unless the certificate pursue the statute it is void. For an authority cannot be executed by one, which is given by the statute to more than one. But it is said to have been decided in *Rex v. Wymondham* (a) that it is sufficient if the certificate be granted by a majority of the churchwardens and overseers de facto, though not de jure. The case however does not go that length. It appeared there that the certificate had been granted by two churchwardens and four overseers, where it had been usual to have four of the first and eight of the latter prior to a certain period when the parish was incorporated with others. It was contended there at the bar, that if there had been an appointment of any other than those four overseers, it must have been void, as not warranted by the stat. 43 *Eliz.* and therefore the certificate must be taken to have been granted by a majority of the legal officers. In answer to which Lord *Kenyon* observed, that if the legality of their appointment were under consideration, it would be impossible to distinguish between the first and the last, and to say that the four first only were legally appointed. But then he went on to state that it did not appear that in fact there were twelve parish officers at the time the certificate was granted: but that it would be nugatory to send the case down again to the Sessions to find that fact, as at any rate he thought that the certificate was discharged by the subsequent act of the pauper. Therefore the conclusion to be drawn from the whole rather is, that in his opinion, if it had been necessary to have had the fact found by the Sessions, and they had returned that there were twelve parish officers at the time, the certificate would have been bad, and advantage might have been taken of the defect in that collateral procedure.

LE BLANC, J. We are called upon to consider the validity of an act done by one *J. W.*, being the only overseer at the time of the township of *Sturston*; and the question is, Whether the act done by him will bind the township? Now the certificate not being executed by any churchwardens can only be good, if at all, under the stat. of *Car.* 2. which enables overseers to

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(a) 6 *Term Rep.* 552.

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be appointed for townships; the statute of King *William* enabling a certificate to be granted by the overseers where there are no churchwardens: but as it is not executed by churchwardens and overseers, it cannot be supported with reference to the stat. 43 of *Elizabeth* appointing such officers to act for the government of the poor. And I also think the appointment was void, taking it to be made under the stat. 13 & 14 *Car.* 2.; because that requires at least two overseers to be appointed; and it is not stated that *J. W.* was originally appointed with another overseer, and that such other overseer had died before that time; but that *J. W.* was the only overseer appointed for the township during that year. Therefore without considering whether it were necessary for the churchwardens of the parish at large to join in the act, at all events this certificate was bad, being only made by one overseer of a township, who had no authority by the Act of Parliament. It will be sufficient to decide the other question when it becomes necessary to do so. But for the present I think there is considerable weight in the arguments used against the necessity of the churchwardens of the parish at large joining in the certificate with the overseers of the township. If it were deemed necessary, they would in many instances have clashing interests. Therefore at present I do not consider that they were such churchwardens whose concurrence in the certificate was required by the stat. 8 & 9 *W.* 3.

LAWRENCE, J. added, that he did not mean to have it understood that he had given it as his opinion that it was necessary for the two overseers to be appointed by the same instrument. The case negatived the appointment of more than one.

Order of Sessions quashed (a).

(a) Vide *Rex. v. Atkins*, 4 *Term Rep.* 12.

Thursday,
Feb. 4th.

The KING against HARWOOD, Clerk.

Where sufficient appears by the affidavits to draw the merits of an

THE defendant was called upon by a rule to shew cause why an information in nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to

election to a corporate office into question, the Court will grant an information in nature of a quo warranto, though the fact of the defendant's usurpation no otherwise appear than by the deponents' swearing to their *information and belief* that the defendant was admitted a freeman, and sworn and inrolled accordingly; the defendant not denying the fact when called on by the rule to shew cause.

be one of the freemen of the city of *Litchfield*. As the sole question agitated at the bar was, Whether there were sufficient evidence of an user or usurpation of the office by the defendant, so much only of the affidavits as bore upon that point are here stated: it having been admitted on his part that if he had used the office in fact, the merits of the election must be submitted to a jury.

By a charter of inspeximus and confirmation of the 16th *Car.* 2. the bailiffs and citizens of *Litchfield* were incorporated by the name of the bailiffs and citizens of *Litchfield*. The charter ordained that there should be two bailiffs elected annually from among the citizens, and one-and-twenty citizens elected, to be named the brethren of the bailiffs of the said city, which two bailiffs and 21 brethren for the time being should be of the common council. It then gave them a power to make bye-laws for the good government of the city, and of all the citizens, officers, &c. brotherhoods, and the several companies of trades, &c. of the inhabitants and residents. The charter also contained a clause, that all who should be admitted freemen of the said city should be sworn in before the bailiffs or one of them to obey all the constitutions and ordinances, &c. and that none should be admitted or continue a freeman before he had taken the oaths of supremacy and allegiance, &c. and subscribed the declaration, &c. before the bailiffs or one of them. It was also deposed by one who had been an alderman and one of the brethren for 12 years, and who had served the offices of senior and junior bailiff, that there are incorporated within the city eight companies of traders. That he always understood that before a man could be made a *freeman of the said city*, it was necessary that he should first be incorporated or admitted into one of the said companies; and that being so admitted into a company, he had a right and could demand, if duly admitted, to be sworn in a *freeman of the company* wherein he had been admitted *before the bailiffs*, or one of them, *and to be inrolled by the town-clerk of the said city; from which time he became a freeman of the said city*, and entitled to the immunities of a freeman, and also to the peculiar privileges of his own company, as the deponent understood and believed. It was also deposed by one of the company of smiths, &c. that at a meeting of the company at which he was present, certain persons (amongst whom was the defendant) were proposed to be admitted

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ted to the freedom of the company. Then after mentioning several circumstances attending such nomination which went to impeach the regularity of the proceeding, the affidavit continued thus: "That *the deponent understands and believes* that "at such meeting on the 1st of *April* last the defendant *Harwood* "and others to the number of seventy and upwards, *as he hath* "*heard and believes*, were admitted freemen of the said company, "and that they have been since sworn and inrolled accordingly, "*as he hath been informed and believes.*" The affidavit then set forth the qualifications required for persons to be admitted freemen, none of which the deponent believed were possessed by the defendant and the rest of the persons so admitted. The same facts were sworn to by others of the freemen in the same manner.

Gibbs, Adam, Clarke, Dauncey, and Jervis, shewed cause against the rule, and contended that the prosecutors had not laid before the Court sufficient evidence of the defendant's having *usurped* the office of a freeman of the city of *Litchfield* to warrant the granting of the information. No *act* or claim is stated to have been done or made by the defendant as such freeman: and though it would have been sufficient if the fact of his having been sworn in before the bailiffs had been positively sworn to, yet even that, which was capable of being ascertained with certainty by reference to the corporation books, was only affirmed according to the deponent's information and belief. The person from whom such information was obtained ought to have been brought forward; but even his name is not mentioned: and at least the prosecutors should have shewn that they had made application for an inspection of the corporation books, and had been denied. This manner of swearing, admitting it to be true and uncontradicted at the trial, would not be sufficient evidence to be left to the jury of the fact of the defendant's usurpation of the office, and therefore it is not enough to put him upon his defence to the issuing of the information now. The prosecutors have been guilty of laches in not having obtained the best evidence which the nature of the thing admitted of; and no inconvenience can ensue from lapse of time in denying the rule for an information till they can come better prepared, the transaction being recent.

The Attorney-General, Erskine, Milles, and Wrottesley, contra, were stopped by

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The Court; who said, that though the affidavits were drawn rather loosely, and the fact of the swearing in might have been brought more precisely before them; yet as no answer had been given to it by the defendant, who had had an opportunity of denying it if the information were untrue; and as it was admitted that the merits of the election, if any, were sufficiently brought in question by the affidavits, they thought that at least enough appeared to put the matter in a course of inquiry.

Rule absolute.

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The KING against The Sheriff of SURRY.

A Rule nisi was obtained for setting aside an attachment against the sheriff (in a cause of *Clarke v. Pierson*) for not bringing in the body: and whether the attachment were regular or not depended upon the question. Whether the putting in of the defendant's attorney as bail were or were not a nullity? The plaintiff in the cause having considered it as a nullity, and proceeded accordingly to attach the sheriff.

If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity.

Mingay and *Marryat* shewed cause against the rule, and contended for the regularity of the attachment. They said, that an attorney had been permitted to be put in as bail only for the purpose of surrendering the principal (a); but not for the purpose of justifying, or of compelling the plaintiff to except to him, in order to proceed against the sheriff, or to take an assignment of the bail-bond. That the rule of Court of *Mich.* 14 *Geo.* 2. B. R. was positive, that no attorney should be bail in any action depending in the Court. And on a similar rule in C. B. *Mich.* 6 *Geo.* 2. the construction and practice was to consider the putting in of such bail as a nullity (b).

Espinasse, in support of the rule, relied on *Thomson v. Routbell*, *East.* 22 *Geo.* 3. in this Court (c), to shew that though it were a good cause of exception to the bail that one of them was the defendant's attorney, yet that the bail-piece was not a nullity on that account. And

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The Court, upon reference to the Master, confirmed the

(a) *Jackson v. Trinder*, 2 *Black. Rep.* 1180.

(b) *Fenton v. Ruggles*, 1 *Bos. & Pull.* 356. *Wallace v. Arrowsmith*, 2 *Bos. & Pull.* 49.

(c) Cited in *Dougl.* 466. n.

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practice to be so in this Court; and were about to make the rule absolute for setting aside the attachment against the sheriff for irregularity: but it appearing that the affidavit on which the rule was obtained was improperly entitled in a cause of such an one *and another* (a); the Rule was discharged.

In another cause of *Foxall v. Bowerman* on the same day, a rule was made absolute on the authority of the opinion above expressed, for setting aside proceedings on a bail-bond of irregularity; the irregularity being, that the attorney's clerk having been put in as one of the bail, the plaintiff considering it as a nullity, without excepting to him, took an assignment of the bail-bond, and proceeded accordingly.

Park and *Reader* were engaged on opposite sides: but *The Court* said, the practice was too well settled to admit of dispute: the plaintiff must except to the bail, and cannot consider the matter as a nullity.

(a) Vide *Fores v. Diemer*, 7 Term Rep. 661. The christian and surnames of the parties must be inserted in the title of an affidavit.

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Where in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

CUNLIFFE, and MALBY his Wife, and Others, (which said MALBY, &c. are Administratrixes of J. HOUGHTON, deceased,) against SEFTON and Others.

UPON a rule nisi for setting aside a nonsuit in this cause, which stood over from last *Michaelmas* Term, *Chambre*, J., before whom it was tried at the last Summer assizes at *Lancaster*, reported that it was an action on a bond given by the defendants to the intestate, dated 31st of *February* 1795, for 600*l.*, to which non est factum was pleaded. That the bond when produced appeared to be witnessed by *Richard Bate*, and by *Alice Houghton*, one of the plaintiffs: and to prove the execution of it the following evidence was offered, viz. That the plaintiffs had taken out a subpœna for *Richard Bate*, one of the subscribing witnesses; and that for the purpose of serving him with it diligent inquiry was made at the place where the obligors and the obligee lived, without having been able to obtain any intelligence of such a person; who he was, or where he lived, or any other circumstance relating to him. That the de-

fendants

defendants had acknowledged the debt, and made a calculation of what was due for principal and interest, which the plaintiffs offered to prove by letters of correspondence: and as *Alice Houghton*, the other subscribing witness, by reason of her interest as administratrix and plaintiff, could not be produced as a witness, it was offered to perfect the proof by evidence of her hand-writing. The learned Judge, upon the authority of *Abbot v. Plumbe (a)*, thought himself precluded from receiving the evidence of acknowledgment as proof of the execution of the bond. He also thought that the inquiry after *Richard Bate* was too slight a foundation for directing the jury to find for the plaintiff upon the rest of the evidence, without producing *Bate* as a witness, or proving his hand-writing. Not having however any doubt of the justice of the demand, he wished to have reserved the point for the determination of this Court upon a case: but there being no person to consent on the part of the defendants, the learned Judge directed a nonsuit, with liberty to the plaintiffs to apply to this Court to set it aside.

Yates now shewed cause against the rule. The case of *Abbot v. Plumbe (b)* is an express authority that an acknowledgment of the bond by the obligors will not supply the want of proof of the execution of it by one of the subscribing witnesses; and the only cases in which evidence of the hand-writing of such witnesses has been holden sufficient were when they were dead (c), or lived beyond sea (d), or had become infamous (e), or were parties interested in the suit (f). This latter exception is indeed applicable to one of the subscribing witnesses; but that will not take away the necessity of calling the other, or, in case of his death, or absence beyond sea, &c. (which the plaintiffs were bound to make out) proving his hand-writing. Now here the evidence of inquiry after *Richard Bate* was not satisfactory to the learned Judge; and therefore it does not fall within the dictum of Lord *Kenyon* in *Barnes v. Trompowsky*. It is not sufficient merely to inquire for the subscribing witness at the places of residence of the parties, it not even appearing that the bond had been executed there. But whether or not reasonable diligence had been used to find the witness was a question for the opinion of the Judge, and he determined in the negative.

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(a) *Dougl.* 216. (b) *Ibid.*(c) *Barnes v. Trompowsky*, 7 *Term Rep.* 266. (d) *Ibid.*(e) *Jones v. Mason*, 2 *Str.* 833.(f) *Godfrey v. Norris*, 1 *Str.* 54. and *Goss v. Tracy*, 1 *P. Wms.* 259.

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The Attorney-General and Carr contra. The witness not having been heard of for nearly seven years, and there being no trace to be discovered of such a person, the inquiry made for him at the places of abode of the respective parties was using the best diligence which the nature of the case would admit of; and the search could scarcely have been extended with any prospect of success without some clue to go by, unless perhaps by advertisements in the public papers; which have never been holden to be necessary. The period of seven years' absence unheard of is a sufficient defence to a prosecution for bigamy (a): and was therefore considered by the Legislature as affording a reasonable presumption of the death of the party. The same presumption is made in other cases (b). This case ranges itself within the principle of the exceptions laid down by Lord *Kenyon* in *Barnes v. Trompowsky*; where reasonable inquiry has been made after a witness without success, there his hand-writing, if known, shall be proved: but even that is impossible, if no account can be obtained who the witness was. In that case, no inquiry whatever had been made after the witness. Then, if the non-production of *Richard Bate* were sufficiently accounted for, and the evidence sufficient to dispense with the proof of his hand-writing, the rest of the evidence was as full and satisfactory as the case would admit of, namely, proof of the hand-writing of the other subscribing witness, who had become interested in the bond after her attestation, and of the acknowledgment of the bond by the obligors the defendants. This latter alone was holden sufficient in *Swire v. Bell* (c), where from the circumstance of the subscribing witness being interested at the time of the attestation, no other medium of proof was attainable by the obligee. The case of *Abbot v. Plumbe* (d) does not go the length of excluding such testimony in all cases, but only where the subscribing witnesses themselves or evidence of their hand-writing may be procured; and that case too only goes to reject the admission of the bankrupt, who was not a party to the record. But exceptions have been admitted to the general rule; as in *Bowles v. Langworthy* (e), where a bill of sale was produced by the defendant himself, and relied on by him on an

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(a) Vide stat. 1 Jac. 1. c. 11.

(b) 1 *Ander.* 20. pl. 42. *Thorne v. Roßff*, Dy. 185. pl. 65. S. C. *Bendl.* 86. pl. 131.

(c) 5 *Term Rep.* 371.

(d) *Dougl.* 216.

(e) *Term Rep.* 366.

examination before commissioners of bankrupt; which was given in evidence in an action of trover by the assigness of the bankrupt against the defendant for the goods conveyed by such bill of sale. So in *Laing v. Raine (a)*, judgment was entered up on an old warrant of attorney without an affidavit of the subscribing witness, who could not be procured; upon proof of the defendant's agreement that it should be so done.

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GROSE, J. The general principle of evidence is clear, that the best evidence which the nature of the case will admit of must be given. Then apply that to the present case: here is a bond executed, nobody knows where, and attested by a witness, of whom nothing appears to lead to a discovery who he was or where he lived. But it was known where the parties to the bond lived; and there it is stated that diligent inquiry was made after the subscribing witness, and no account could be obtained of him. The bond itself is dated in *February 1795*, and the obligee is since dead. I do not see what the plaintiffs could have done more than they have. Then if they have used due diligence without effect, that will let them in to secondary evidence. It is plain from the report that the learned Judge was not satisfied with the first impression of his mind, that the evidence offered ought not to have been received; because he reserved the point, and referred it to our opinion: and upon more mature consideration we think that the evidence offered was sufficient to entitle the plaintiffs to recover. I form this opinion with reference to what is daily passing in the world. The frequency of written instruments in modern times has made persons less careful than they used to be in the selection of witnesses to their attestation. It has occurred to me to know that persons unknown to the parties, such as waiters at a tavern, have been called in to attest instruments of the most important kind, even wills; where the parties had no previous knowledge of them, nor even were apprized that they bore the names by which they attested the execution. The difficulty therefore which has occurred in this case can be no matter of surprise. On the whole I think the nonsuit ought to be set aside; and possibly the plaintiffs may, in the mean time, be able to procure some intelligence of the subscribing witness.

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LAWRENCE, J. It is now admitted as a general rule, that proof of the acknowledgment of a defendant is not sufficient in

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(a) 2 Bos. & Pull. 85.

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an action on a bond without calling the subscribing witness. The only question now is on that part of the report of the learned Judge, which states that he was not satisfied that sufficient inquiry had been made after *Richard Bate*, one of the subscribing witnesses, in order to let in the proof of the hand-writing of the other subscribing witness, who has since become one of the parties interested. Now no doubt that a subscribing witness's hand-writing may be proved, if diligent inquiry have been made after him, and he cannot be found. Then the question is, Whether it be not sufficient to inquire after a witness whom nobody knows at the place where the obligors and obligee lived? It is stated, that diligent inquiry was made after the witness there, but without success: then where else were the parties to inquire? It does seem that they have done every thing that could be expected of them; and if so, I think they ought to have been let into the secondary evidence offered.

LE BLANC, J. Inquiry was made for the subscribing witness at the only place where it was probable to find or hear of him. The only other step the parties could have taken was to advertise for him in the public papers: and unless the Court should hold that necessary to be done in all these cases, I think the plaintiffs have made all the inquiry which could reasonably be required of them.

Rule absolute.

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Saturday,
Feb. 6th.

The KING against the Inhabitants of MELLOR.

A contract for a *standing-place in another's mill for a carding machine (the party's own property)* which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill; for which the party was to

TWO justices by an order removed *John Turner*, his wife and children by name, from the township of *Bramhall*, in the county of *Chester*, to the township of *Mellor*, in the county of *Derby*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case:

The pauper, being legally settled in *Mellor*, took a house in *Stockport*, in the county of *Chester*, of the value of 5*l.* a-year, which he occupied for more than forty days: and also took from the owner of a mill in *Stockport*, worked by a steam engine, a *standing-place in a room for a carding machine* of his own, which was worked by the machinery of the steam engine, and fastened to the floor and the roof of the room. He was to pay

give 2*l.* a-year, with liberty to quit on three months' notice; is not a taking of a tenement; but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it.

his

his landlord 20*l.* a-year; and agreed with him that each should give the other three months' notice to quit. He occupied this at the same time with the house for more than forty days. There were other tenants who had carding machines in the same room upon similar terms; and they, as well as the owner of the mill, were respectively furnished with keys to it. The owner's key was a master-key to all the rooms in the mill.

The Attorney-General and *Littledale*, in support of the order of Sessions, maintained, that "a standing-place in a room for "a carding machine" could not be considered as a tenement the occupation of which can give a settlement; being no part of the room itself, though fastened by temporary fastenings to the floor; and being nothing more than a mere personal liberty to use a portable piece of machinery in a particular place (as the very name imported) in order for the party to avail himself of the fixed machinery of the mill to facilitate his work. There was no letting of any thing fixed to the freehold; but a mere temporary licence to attach something of the party's own to what was so fixed. No ejectment could have been brought for such standing-place, any more than for a seat at a theatre which the party obtains a licence to use during the season; but a tenement must be something of the realty, for which an ejectment will lie; and of which the sheriff may deliver possession upon a writ of *habere facias possessionem*. This case falls directly within the principle of the decisions in *Rex v. Dodderhill (a)*, and *Rex v. Tardebigg (b)*. In the former, the renting by a needle-maker of two out of six *pointing-places* in another's mill was holden not to be the taking of a tenement within the statute; though the machinery there used was the mill owner's, and part of the thing let; which made that case, if any thing, stronger than the present in favour of the settlement. It is probable that the *pointing-places* (which were described as frames of wood supporting spindles on which grinding-stones turned with great velocity by means of leathern straps communicating with the great wheel of the mill) were fastened in some manner to the floor, from the way in which they were worked: but in *R. v. Tardebigg*, the *runner* (rented also by a needle-maker) was expressly stated to be a piece of machinery screwed down to the floor; and yet it was holden not to be a tenement,

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(a) 3 *Term Rep.* 449.(b) *Ante*, 1 vol. 523.

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the renting of which, though in conjunction with the exclusive * use of a room in another's mill, would give a settlement. Lord *Kenyon* said, that the contract was in effect no more than a licence to use a particular part of the machinery of a mill, and was no more a taking of a tenement than if a man contracted to pound in a certain mortar, or use a particular grinding-stone in a mill. This is not like the case of *Rex v. Whitechapel (a)*; for that was the taking of the room itself, though to be used for a particular purpose and at certain times.

Erskine, Balguy, and Hill, contrà, endeavoured to distinguish this from the cases of *R. v. Dodderhill (b)*, and *R. v. Tardebigg (c)*, on the ground, that in those cases the takings were of the particular pieces of machinery called *the runners*, and the *pointing-places*, which were mere chattels, and no part of the mill itself: whereas here the taking is *a standing-place* in the room of the mill, which is necessarily a taking of part of the mill itself, though for a particular purpose, namely, for the purpose of putting up in such room a machine to be worked by means of the mill-wheel. The carding machine could not have been the subject-matter of the letting, because that was the pauper's own; the only thing therefore which could be let was *the place in the room* where it was to be fixed: the taking therefore was of that part of the tenement itself, and not of the machinery, as in the former cases. Then the particular use which was to be made of the part of the room so taken cannot vary the effect of the contract of letting. The use of a tenement is more or less limited in most cases: that was no objection in *Rex v. Whitechapel (a)* to the gaining of the settlement: and in *R. v. Tardebigg, Lawrence, J.* distinguished that from the *Whitechapel* case, because it was not stated that the runner was in the packeting-room which was appropriated to the pauper's use. [*Lawrence, J.* That observation was made by me in answer to an argument urged at the bar, that as the value of the sitting-room was enhanced in the one case by the use of the furniture and the fire which was to be provided by the owner, so in the other the value of the packeting-room might be enhanced by that of the use of the runner. But I did not mean to give any opinion, that supposing the runner had been found to be placed in the packeting-

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(a) *Hil. 26 Geo. 3. 2 Const. 151. pl. 124.*(b) *8 Term Rep. 442.*(c) *Ante, 1 vol. 528.*

room, the respective values of each, which were distinctly found, could be added together, and applied to the packeting-room alone.] Here the value of the thing let, which was part of the room itself, is sufficient to confer the settlement. The terms of the contract also shew that the thing let was the room and not the machinery; for there was to be three months to quit respectively; which could not apply to the machine, that being the pauper's own property; and shews that the parties intended to contract for the use of the freehold itself. Suppose one having furniture of his own took an apartment for the express purpose of placing it there; that could not be considered as any other than a contract for the room itself, and not merely a personal licence to place the furniture there. This case comes directly within the principle of *Rex v. Tolpudde (a)*, and that class of cases. The taking of so many cows cannot be any other than a mere contract for personal chattels; but if the taking be of cows to be fed in certain pastures, that has been holden to be the taking of a tenement; being in effect a renting of the growing produce of the pasture, to be taken, as Lord *Kenyon* said, by the mouths of the cows. So here, though the taking of a moveable machine will not give a settlement, yet if the contract be for a certain part of the freehold for the purpose of placing and using the machine there, the legal possession of the freehold passes to such special occupier, as much as if it had been a general taking. In *R. v. Piddletrentthide (b)* the taking of a rabbit-warren was deemed to confer a settlement, although it was expressly found in the case that the pauper had no right in the soil, except that of entering upon and killing the rabbits there; the landlord constantly depasturing the same, and ploughing some part thereof. *Buller, J.* there said, that the true question was, Whether the contract were to receive profits out of the use of the land. Now here the profit was derived out of the use of the freehold as much as in that case.

GROSE, J. The question is, Whether what the pauper contracted for were a tenement? The magistrates state it to be a *standing-place* in a room in a mill, for the purpose of placing there a carding machine of his own, which was to be worked by the means of the general machinery of the mill. Now what is that more or less than contracting for a liberty to go and stand

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(a) 4 Term Rep. 671.

(b) 5 Term Rep. 772.

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there for the purpose of working at his trade? It has been attempted to distinguish this case from those of *Dodderhill v. Tardebigg*, which are admitted to have been properly decided: but I have listened in vain for any solid distinction to be shewn between them; and we must take care not to give way to refined and subtle distinctions on these subjects, which at last leave the magistrates below no clear rule to go by. Therefore, without entering into any further reasoning on the subject, which will only furnish fresh arguments for doubts on future occasions, I think this was a contract for nothing more than a liberty for the pauper to stand and work his machine in a room of the mill; and that it conferred no settlement upon him.

LAWRENCE, J. This case is governed by those of *R. v. Dodderhill* and *R. v. Tardebigg*, from which it has been endeavoured to distinguish it by saying that those were only licences to use certain machines belonging to the owners of the mills; whereas this is a hiring of part of the mill itself; because it cannot be supposed that the pauper contracted for a licence to use his own machine. But it is to be observed, that the contract here is not pretended to be for the use of the pauper's own machine, but for a licence to make use of the steam engine of the mill, by applying to it his own machine. Now what difference can there be between a licence to use another's machine, and a licence to apply the party's own machine to the machinery of another's mill? But it is said, that the pauper contracted for the standing-place in the room where the machine was to be put. To be sure he must have a place to stand and work the machine, otherwise the contract was absurd and nugatory: but how does that differ from a general licence for him to use the machinery there? Therefore on this plain ground, that the contract was for a mere licence for the pauper to use the machinery of the mill, and not a letting of any part of the mill itself, I am of opinion that no settlement was gained in *Stockport*.

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LE BLANC, J. The substance of the contract was for the use of the machinery, and not a hiring of any part of the room in the mill. It was a hiring of the use of the mill-owner's machinery, as in the other cases referred to; with this difference, that instead of using the owner's machine, he was to apply his own machine to the moving power of the mill, in order to enable him to work it with facility. But whether he contracted for

for the use of the mill-owner's machinery directly: or by the intervention of some other machine of his own applied to the other, is exactly the same thing.

Order of Sessions confirmed (a).

(a) Vide *Rex v. The Inhabitants of Londonthorpe*, 6 Term Rep. 377, where the Court held, that the value of a post wind-mill erected by a tenant on land rented by him, (which land in itself was under the value of 10l. per annum,) could not be taken into the account so as to raise the annual value above that sum; it being a mere personal chattel, not fixed to the freehold, which the tenant was at liberty to remove at the end of his term, and therefore no tenement,

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The KING against PICTON.

Wednesday,
Feb. 3d.

A Conviction on the game laws, removed into this Court by certiorari, was as follows:

(*Surry.*) Be it remembered, that on the 16th of *September* in the 41 *Geo. 3. &c. at, &c. W. D. of, &c.* came before me *J. B.* one of the justices, &c. and then and there gave me the said justice to be informed that one *Cæsar Picton* of, &c. within three months last past, to wit, on the 16th of this same month of *September*, in the said 41st year, &c. the said *Cæsar Picton* not having then lands or tenements, &c. (negating the qualifications in the statute 22 & 23 * *Car. 2. c. 25.*) did at, &c. keep and use a certain gun to kill and destroy the game, against the form of the statute, &c.; whereupon the said *C. P.* afterwards, to wit, on the same 16th day of *September* in the 41st year, &c. at, &c. had notice of the said information and of the offence therein charged upon him as aforesaid, and was then and there by me the said justice in due manner summoned to appear before me the said justice at, &c. to make his defence to the said charge contained in the information aforesaid. And thereupon afterwards, viz. on the 26th of *September*, in the 41st year, &c. at, &c. he the said *C. P.* being daily summoned as aforesaid in this behalf before me the said justice appeareth and is present, in order to make his defence against the said charge, &c., and having heard the same, he the said *C. P.* is asked by me the said justice if he can say any thing why he should not be convicted of the premises above charged upon him

If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add as impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath.

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him in form aforesaid; who pleadeth that he is not guilty of the said offence. Whereupon I the said justice, at the same time and place, viz. on the said 26th of *September* in the year aforesaid, at, &c. do proceed to examine into the truth of the said complaint contained in the said information in the presence and hearing of the said *C. P.* And thereupon one credible witness, to wit, *J. C.* of, &c. cometh before me the said justice, and before me the said justice upon his oath, &c. by me the said justice administered, in the presence and hearing of the said *C. P.* depose, &c. that the said *C. P.* on the said 16th day of *September* in the year aforesaid, at, &c. did keep and use a certain gun to kill and destroy the game. (And then proceeded to negative severally the defendant's qualifications according to knowledge or belief.) And the said *C. P.*, although called upon for that purpose, doth not prove that he was qualified to keep and use the said gun for the purpose aforesaid by any of the means herein before-mentioned; nor shew any reason to me the said justice why he should not be convicted of the said offence: nor does he offer any evidence whatsoever before me, or require time for the production thereof: and thereupon I the said justice do adjudge that the said *C. P.* was and is unqualified, and guilty of the offence aforesaid. And therefore the said *C. P.* on the said 26th of *September* in the year aforesaid, at, &c. before me the same justice, by the oath of the witness aforesaid, according to the form of the statute, &c. is convicted thereof: and for his offence aforesaid hath forfeited 5*l.* to be distributed as the statute, &c. directs. In witness whereof, I the said justice to this present record of the conviction aforesaid have set my hand and seal at, &c. the 4th day of *November*, in the year aforesaid.

J. B. (L. S.)

Mauley took several objections to the conviction, the principal of which were, 1st, that the conviction was dated on the 4th of *November*, in the year aforesaid, which by reference must be taken to mean the 41 *Geo. 3.* and therefore before the offence committed, which was not till the 16th of *September* following, *R. v. Kent*, 2 *Id. Raym.* 1546. And this cannot be rejected as surplusage, because the time of the conviction, as well as of the offence, ought to appear. *Rex v. Pullen*, *Salk.* 369. 2dly, It is not stated that the magistrate had jurisdiction to administer the oath.

The

The Court said, that as to the first objection, it was expressly stated that the offence was committed on the 16th of *September*, 41 *Geo.* 3. and that the magistrate, after summoning the defendant and examining the evidence, &c. on the 26th of the same *September* convicted the defendant of the offence. What follows therefore as to the date of setting his hand and seal is insensible, and may be rejected as surplusage. That it was immaterial when he put his hand and seal in point of form to the conviction. That as to the other objection, the conviction was in the common form in which many others were drawn. The Act of Parliament gives the magistrate authority to administer the oath in that respect.

Marryat was to have argued in support of the conviction.

Conviction affirmed.

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The KING against The Inhabitants of MINWORTH.

Saturday,
Feb. 6th.

TWO justices by an order removed *James Field*, his wife and children by name, from the township of *Minworth* in the county of *Warwick* to the township of *Worley Wigorne* in the county of *Worcester*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case :

The pauper, being settled in *Worley Wigorne*, afterwards rented, under a verbal agreement from *Lady-day* 1800 till six weeks after *Michaelmas* 1800, two cows, at the rate of five shillings a cow per week, of *J. Griffiths*, who was the tenant and occupier of certain lands in *Minworth*. It was also agreed between the parties, that the owner of the cows should feed and support them: and for that purpose such cows should feed and depasture in the lands of *Griffiths* called the *Two Pixalls* and *Top Ropes*, and also in certain other lands called the *Lower Ropes* and *Minworth Field*, after the said last-mentioned lands should be mown: all of which lands were in *Minworth*; but the lands on which the said cows were so depastured were not of the annual value of 10*l.* *Griffiths* was not to feed any other cattle in any of the above-mentioned lands whilst the same were depastured with the cows so rented by the pauper. The contract continued in force for the space above-mentioned,

Renting a dairy (including the cows and their pasture at above 10*l.* a year in value, will not confer a settlement if the annual value of the lands on which the cows were to be depastured were under 10*l.*

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during

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 bitants of
 MINWORTH.

Erskine and *Reader*, in support of the order of Sessions, contended that the renting the dairy in *Minworth* gave the pauper a settlement there, although the value of the lands on which the cows were depastured did not amount to 10*l.* per annum. The cases of *Rex v. Piddletrentthide* (a) and *Rex v. Tolpudde* (b) must govern the present. In the latter, which was the case of renting a dairy, the annual value of the land did not appear (c). [*Grose, J.* It was taken for granted there that the value of the land was 10*l.* a year; and the attention of the Court was not called to any other view of the case.] At any rate, in the former case of the rabbit-warren, the value of the land was well known to be little or nothing, and that the sole profit was derived from the rabbits. Besides, it has been always holden sufficient to confer a settlement, that the annual value of 10*l.* has arisen from something connected with the realty, though no part thereof; as in the *Whitechapel* case (d), where the furniture and firing found in the room contributed to make up the requisite value of the tenement. So in *R. v. North Bedburn* (e), a land sale colliery leased to the pauper was holden to be a tenement of sufficient value to confer a settlement, although the value of the land itself, apart from the stock of horses, gins, ropes, and other things necessary for the working it, was affirmed to be under the annual value of 10*l.*

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Clarke contra was stopped by the Court.

GROSE, J. This case is very plain. Unless the pauper occupied a tenement of 10*l.* a-year value he could gain no settlement. And that fact is expressly negatived; for it is stated that he rented two cows, which were to be fed on particular lands, and that those lands were not of the annual value of 10*l.* That makes an end of the question. The principle on which the renting of dairies (as it is called) has been holden to confer

(a) 3 Term Rep. 772.

(b) 4 Term Rep. 671.

(c) That fact was not stated in the case; but it appears by a note in p. 672, of the report, that to a question put by the Court to the bar, it was admitted that the annual value of the land in that case was more than 10*l.* This note was referred to by *Clarke*, who was to have argued against the order of Sessions upon the present occasion.

(d) *Hil. 26 Geo. 3. 2 Const.* 151, pl. 191.

(e) *E. 24 Geo. 3. 2 Const.* 155.

a settlement is, that in truth and effect it is a contract for a certain interest in the land to be enjoyed in a particular manner: that alone constitutes it the taking of a tenement: and in each of the cases which have been decided on that ground it was understood that the land itself was of the requisite value. Then in analogy to all the cases in *pari materiâ* we are bound to say, that the pauper did not gain a settlement by the renting and occupation in question.

LAWRENCE, J. In the case of *The King v. Tolpuddle*, the ground on which the Court went was, that the contract there stated gave the pauper a right to take the produce of the land by the mouths of the cattle; and that it was the same as if he had rented so much pasture for his cows to the value of 10*l.* a year. The value of the cows hired was never taken into consideration as forming part of the value of the tenement. Nothing can be concluded against this from the case of *The King v. North Bedburn*. For it seemed to be the object of one of the parties at the Sessions to distinguish between the value of the land and of the things leased with the land; and the Sessions let them into that evidence (being parol evidence of the lease which the lessor had refused to shew, and which was not then produced); and this Court held that the Sessions had done right. That rather shews that the distinction was considered to be material; but it was not established in point of fact. The case of the warren falls under a different consideration: the produce of a warren is the rabbits as much as the produce of a fishery is the fish. But that is not like a contract for the hire of cows.

LE BLANC, J. In the former cases the Court held that the renting of a dairy with land which was of the annual value of 10*l.* was the same as renting land of that value, the produce whereof was to be taken by the cows. But that is not like a contract for the hire of cows with the use of land under the value of 10*l.* a year. With respect to other cases, where the value of land has been raised to that amount by things erected upon it, the Court has resisted the attempt to separate the value of the land from that of the erections attached to it. Such seems to have been the case in *R v. North Bedburn*. But that differs greatly from the present case, where the renting is of cows which are not annexed to the land.

Order of Sessions quashed.
The

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against
The Inhabitants of
MINWORTH.*

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1802.

Saturday,
Feb. 6th.

The KING against MACLEOD.

A defendant
in a crown
prosecution
cannot carry
down the nisi
prius record
to trial by
proviso.

THE defendant was in custody in execution of several sentences for misdemeanors, of which he had been convicted; and had pleaded not guilty to an information filed against him by the Attorney-General for a libel, in which notice of trial had been given on the part of the Crown to the defendant several Terms ago, which had been renewed at several intermediate sittings. Whereupon on a former day of this Term,

Scott moved for a rule (in substance) calling on Mr. *Attorney-General* to shew cause why a day should not be peremptorily fixed for the trial of this information. This motion was grounded on a long affidavit of the defendant, stating the several stages of the proceedings which had hitherto been had, and the different notices of trial given; and complaining of the hardship, expence, and vexation which he had thereby sustained. And the rule was framed upon what is stated to have been said by the Court in the report in 6 *Mod.* 247, in the case of *The Queen v. Sir Jacob Banks*; “that in all indictments or informations here, &c. the defendant has no other way to hasten “on his trial but by application to the Court; who upon hearing the reasons of Mr. *Attorney-General*, will, as they see “occasion, either give him further time, or fix him a day peremptorily for the trial, or give the defendant leave to bring it “on himself.” And at the same time *Scott* said, there might be great doubt as to the authority of the decision in *Rex v. Dyde* (a), that a defendant could not carry down the nisi prius record to trial by proviso in a case where the King was party, which he said was not warranted by the authorities referred to in the report of the case.

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The Court (after consulting the officers of the crown-office,) said, that there was no instance of such a rule as that now prayed for having ever been granted. That what was said in the report of *Rex v. Sir Jacob Banks* in 6 *Mod.* must be understood as referring to trials at bar. That it did not occur to them how this Court could exercise a jurisdiction over the Judge presiding in the Court at nisi prius before whom the nisi prius

(a) 7 *Term Rep.* 661.

record be, so as to govern his discretion as to the particular day when the information in question should be tried. That if the defendant first shewed any ground to the Court for directing a trial at bar, it would be afterwards competent to him to move the Court to fix a particular day for it, as they might regulate the method of their own proceedings. But that if the defendant were not inclined to adopt this, which occurred to them as the only mode by which he could obtain the object which he pressed for; and his counsel really meant to contend that the point ruled in the case of *The King v. Dyde* was not law, (which was however recommended to his re-consideration) they would grant a rule to shew cause why the defendant should not be at liberty to proceed to trial by proviso at the Sittings at nisi prius after this Term.

The defendant's counsel assenting to accept the rule in this form, it was accordingly granted.

The Attorney-General and *Garrow* now shewed cause against the rule; and after going at length into the reasons which had induced the postponement of the trial from time to time, some of which had originated with the defendant himself, and all of them accounting satisfactorily for the delay which had arisen, so as to do away any imputation of wilfulness, or intention to harass the defendant; they were proceeding to support the authority of the decision in *Rex v. Dyde*, which was in point against the present application; when the Court said, that it lay upon the defendant's counsel to disprove that authority. They therefore concluded by observing shortly, that the very report referred to in 6 *Mod.* 247. of Sir *Jacob Banks's* case (a), stated that there could not be a trial by proviso in the King's case, because there could be no laches imputed to him; and that the rest of what was there stated had already received an answer from the Court. That the authority of *R. v. Dyde* was also supported by 2 *Hawk. c.* 41. s. 10. as well as by 2 *Inst.* 424.

Scott in support of the rule (being desired by the Court to confine himself to the question, Whether they had authority to permit the defendant to carry down the record to trial by proviso in a case where the Crown was prosecutor), contended that an information by the Attorney-General ex officio, was,

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(a) Reported also in 2 *Ld. Raym.* 1092. 1 *Sulk.* 652. and 11 *Mod.* 33.

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when filed, subjected to the general jurisdiction of the Court in every respect, the same as any other proceeding: and that it was part of the essential constitution of the Court that they should have power to direct the form and manner of proceeding to trial in such way as would best promote the ends of justice, and prevent oppression on the defendant. In 3 *Com. Dig. Information*, D. 4. it appears that an information filed by the Attorney-General may be quashed by the Court upon cause shewn; for which is cited *Fountain's case*, 1 *Sid.* 152. It follows then, that if the Court may quash the information altogether, they may direct when it shall be tried in the same manner as in other informations at the suit of private prosecutors. The case of *R. v. Dyde (a)* was the first direct judgment on the point: it passed without argument, and is not warranted by any precedent. The only authorities referred to are those of Sir *Jacob Banks's case*, 6 *Mod.* 247. and 2 *Inst.* 424. In the first, the only question before the Court was, Whether there should be a new trial, the first having been had by surprise on the prosecutor: which was accordingly granted. The indictment there which was originally found at the Sessions had been removed hither by certiorari at the instance of the prosecutor, who was a private person, and who had made no default before trial. Now in no case can a defendant carry down a record to trial by proviso, till the prosecutor or plaintiff has made default at one trial. Whatever therefore was said as to the inability of a defendant to do this in a prosecution at the suit of the Crown was an obiter dictum. But if that were entitled to consideration, the same consideration is also due to what was also said, that the Court upon application of the defendant would, if they saw occasion, fix him a day peremptorily for the trial, or give him leave to bring it on himself. Then as to the other authority relied on in 2 *Inst.* 424. it has no relation whatever to trials by proviso; but merely states that a writ of nisi prius shall not be granted where the King is party, without a special warrant from him, or the assent of his Attorney-General.

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GROSE, J. The trial by proviso (b) it is well known was given in order to prevent defendants from being oppressed by the

(a) 7 *Term. Rep.* 661.

(b) The trial by proviso takes its name from a clause in the *distringas* which provides, that if two writs come to the sheriff, he shall only execute and return one of them. Vide 2 *Tidd's Prac.* 686. cites 2 *Lil. P. R.* 612. 617. that is, if

the laches of plaintiffs; and if the defendant could have shewn himself entitled to it, we should not withhold from him his right;

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if two writs come to the sheriff in the same cause, (the one being supposed to be delivered on the part of the plaintiff, the other on the part of the defendant,) he shall summon but one jury for the trial of the issue. *Trial per Pais*, 71. But the trial shall in all cases be by the plaintiff's record, if he enter it in time. *Tidd's Prac. ib.* In no cases is the trial by proviso grantable to the defendant unless there has been laches in the plaintiff, *Dy.* 215. *b.* *Staundf. P. C.* 155. except in cases where the defendant is an actor, as in replevin, prohibition and quare impedit. *ibid.* and 2 *Hawk. ch.* 41. *s.* 10. I do not find it any where stated how soon after the stat. of *West.* 2. *c.* 30. (13 *Ed.* 1.) which gave the writ of nisi prius, as it has been long called, (2 *Inst.* 424.) the practice of trial by proviso prevailed. By the stat. 2 *Ed.* 3. *c.* 16. it was enacted, that inquests in plea of land should be taken as well at the request of the tenant as of the demandant. In the 8 *H.* 6. it was resolved by the Court, on complaint of the defendant, that the plaintiff had kept back the writ so that the sheriff could not serve the jury with process, that both of them should have writs, with a proviso that the sheriff should only execute one of them. 8 *Hen.* 6. 6. *Bro. Process*, pl. 56. The practice is also recognized in several cases in the year books. *Temp. Hen.* 7. cited in *Staundford's P. C.* 155. and by the stat. 7. & 8 *W.* 3. *c.* 32. which enacts, "That if any defendant or tenant in any action depending in any of the said Courts (i. e. of Westminster,) shall be minded to bring to trial any issue joined against him, when by the course in any of the said Courts he may lawfully do the same by proviso; such defendant or tenant shall or may, of the issuable term next preceeding such intended trial to be had at the next assizes, sue out a new venire facias to the sheriff in form aforesaid by proviso," &c. All the books before referred to which touch on that branch of the subject which was in judgment in the principal case, and other authorities, agree that there can be no trial by proviso against the King, (unless by his special warrant, or the assent of his Attorney-General, *Fitz. R. B.* 241.) because no laches can be imputed to him. Whether this rule applies as well to private prosecutors is not so universally agreed. An anonymous case in 1 *Sid.* 316. says, that the Court held that the defendant in any indictment for perjury might try the issue by proviso if the prosecutor would not try it. And such I am informed is the prevailing practice in the Crown-office in the case of private prosecutors making one default in not proceeding to trial. For in truth the King is no otherwise interested in the indictment than in point of common justice. 3 *Salk.* 362. Yet it is to be observed, that the general authorities referred to speak in general terms of there being no trial by proviso where the King is party, without distinguishing between public and private prosecutions. To which may be added 1 *Ventr.* 315. and 1 *Keb.* 195. and it was once doubted in the case of a qui tam information, because the Queen was quodam modo a party to the suit. 2 *Leon.* 110. Perhaps it may be thought that independent of any question which may arise upon the ancient practice of the Court since the stat. of *Westm.* 2. in this respect, the present practice of the Crown-office

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right; for judges as well as all others are interested that every thing should be done according to law: but if the law does not authorize us to grant what is prayed for, we cannot usurp that power. Now Lord Coke in his comment on the Statute of *Westminster* 2., granting the writ of nisi prius, says that a nisi prius shall not be granted where the King is party, or where the matter touching the right of the King, without his special warrant, or the assent of his Attorney-General. This is founded on the known rule, that no laches can be imputed to the King. And no other law has given the defendant this privilege. The same doctrine is corroborated by what was said by the Court in *Rex v. Sir Jacob Banks*, that there could be no trial by proviso against the Crown; for which *Powell, J.* gave the reason (*a*) I have before assigned; because a proviso implied laches, which could not be in the Crown. Then came the case of *The King v. Dyde*, which is an express authority in point. It is said that that case passed without argument: but considering the character and talents of the defendant's counsel in that case, it cannot be supposed that he would not have argued the point if he had thought it tenable: and it is too much now to contend against the authority of the case, as not having been resisted, when the matter was thought even by the defendant's counsel to be too clear for argument. And even now that the question has undergone revision, not a single authority has been produced in support of the rule. Nor can I find any case where a defendant

may in part be referred to the statutes 5 *W. & M. c.* 11. and 8 & 9 *W. S. c.* 53. which direct that no indictment or presentment found at the quarter sessions shall be removed into this Court by certiorari at the instance of a defendant until he shall have entered into recognizance, &c. in a certain sum to appear and plead in *B. R.*, and at his own costs and charges to cause and procure the issue joined therein to be tried at the next assizes after such certiorari returnable, &c. or at the Sittings, &c. if the Court of *B. R.* shall not appoint any other time for the trial thereof, &c. But these statutes will not solve the difficulty; for they relate only to indictments removed at the instance of defendants, where the record is made up by them (not by proviso, but pursuant to the recognizance,) without any laches having occurred in the prosecutor. And the statutes have no relation to informations or indictments removed by the prosecutor, where after one default by him the defendant makes up the record by proviso. At any rate, however, it seems that in all cases the Attorney-General's warrant is necessary for the trial at nisi prius; (*Salk.* 652.) which as it is said implies the consent of the Crown to try the cause in the country.

(a) 2 *Ld. Raym.* 1035.

has taken down the record to trial by proviso as against the Crown. In saying so I do not mean to be understood to include the case of prosecutions at the suit of private persons: those may admit of a different consideration: but I believe no such case ever existed where the Crown was the real prosecutor. It is unnecessary to enter into the particular merits of this case, or the complaint of oppression on the part of the defendant. What has been said by Mr. *Attorney-General* is perfectly satisfactory on that head. It is sufficient to observe, that we cannot grant the remedy prayed for. There is however a remedy (a) [209] which the law and the books point out to the defendant, if he can shew a case of grievance to the Court to entitle himself to it. But whatever personal inconvenience he may have suffered by the delay, we have no authority to give him redress by this mode.

LAWRENCE J. This is a dry question of law as to the practice in these cases: we cannot alter the law; we can only pronounce what we find it to be. For this purpose we cannot do better than look to the opinions of our predecessors, and particularly to what was said by Lord *Holt* in *Sir Jacob Banks's* case, which is very clearly reported in *Salk.* 652. "That in civil actions the defendant cannot carry down a cause by proviso till there be a laches in the plaintiff, except in causes where the defendant acts as a plaintiff, as in replevin, &c. That there can be no trial by proviso in a cause of the Crown, because there can be no default nor laches: nor can the Crown be compelled to try any cause by nisi prius; and therefore every cause of the Crown in this Court must be tried at bar, unless the *Attorney-General* allows a warrant of nisi prius, which implies his consent to try the cause in the county." So it is said all through the book, that there can be no trial by proviso against the Crown; because the only foundation for such a trial is laches in the other party, which cannot be imputed to the Crown. When this matter was first moved in Court, we referred the defendant's counsel to the case of *The King v. Dyde*, to shew that he could not have the relief he prayed in this form. In consequence of which another motion was substituted in lieu of it, so strange and unprecedented, that the Court would not even grant him a rule to shew cause: then he reverted back to the

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(a) This was probably in allusion to a trial at bar.

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present motion, upon a suggestion that the case of *The King v. Dyde* was decided without consideration. But it is an odd argument for lessening the authority of a case, that one of the most able advocates at the bar thought the point too clear for argument.

LE BLANC, J. This is an application for a trial by proviso. Now a trial by proviso is not a matter in the discretion of the Court to grant or refuse according to the particular circumstances of the case. Therefore it is not an application to our discretion. But where a party is entitled to it, he has it of course without an application to the Court. The first motion which was made in this case for the fixing a particular day for the trial of this information could not be granted; because this Court cannot order what shall be done before the judge of nisi prius. For it would be nugatory to make an order for the trial of the information on a particular day, when perhaps the prosecutor might not think proper to carry down the record. Then as to the present motion, there can be no trial by proviso in a case like the present, because there can be no laches imputed to the Crown. If no instance can be produced of a trial by proviso in a Crown prosecution, that of itself is a strong argument that none can be had. But it does not rest on that negative argument; for in the case of *Sir Jacob Banks* it was expressly said, that it could not be granted: and when the question was again brought forward in *Rex v. Dyde*, it was considered to be so clear and well settled by a counsel of great eminence at the bar, that it was given up without dispute. Then where no instance can be produced of such a trial, and it was holden in *The King v. Sir Jacob Banks*, that it could not be granted, and the point was abandoned as untenable in *The King v. Dyde*, it would be too much for us to grant it against all the weight of authority.

Rule discharged.

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SHEPHERD, Executor, &c. against JOHNSON.

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Saturday,
Feb. 6th.

THIS was a writ of inquiry to assess damages on a bond given by the defendant, conditioned that his co-obligor should replace a certain quantity of stock which the testator had lent him, and which was to be replaced on the 1st of *August* 1799. At the trial before *Le Blanc*, J. at the sittings in term at *Westminster*, the only question was, Whether the damages should be calculated at 1133*l.* 18*s.* 6*d.* the price of the stock on the 1st of *August* when it was to be replaced; or at 1224*l.* 1*s.* the price of the stock on the day of trial; the value of the stock having risen so much in the mean time? The learned Judge being of opinion, that as the agreement had been broken, and the stock never replaced, the plaintiff was entitled to recover the larger sum, being that which could alone indemnify him at the present time. And the verdict was taken accordingly for 1224*l.* 1*s.*, with leave for the defendant to move the Court to reduce the damages to 1133*l.* 18*s.* 6*d.* if they were of opinion that the plaintiff was not entitled to recover more.

Littledale now moved for a rule to that effect; and referred to *Dutch v. Warren* (a) and *Sanders v. Hawksley* (b), * where the damages had been estimated by the price of the stock at the time when it ought to have been replaced; though he admitted that in the latter case the stock had fallen in value before the trial. He also mentioned a case of *Isherwood v. Seddon*, Sittings after *Mich. Term* 1800, before Lord *Kenyon*; where in an action on a bond conditioned to replace stock on a certain day, the price of the day was taken as the criterion of the damages; because it was the plaintiff's own fault if he delayed bringing his action upon the default of the defendant, so as to lose the benefit of the subsequent rise of the stock. And he urged the last-mentioned reason as an argument against taking the price of the stock at the day of the trial in case it had risen in the mean time; for then after a default once made, it would be in the plaintiff's power either by hastening or delaying his suit to take advantage of the rise in the market without any risk in case the market fell.

GROSE, J. The true measure of damages in all these cases is

(a) 2 *Burr.* 1010. 1 *Str.* 406, S. C. but not so well reported.

(b) 8 *Term Rep.* 162.

that

In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time; but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising.
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that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards so as to avail himself of a rising market.

LAWRENCE, J. Suppose a bill were filed in equity for a specific performance of an agreement to replace stock on a given day, which had not been done at the time; would not a Court of Equity compel the party to replace it at the then price of the stock, if the market had risen in the mean time?

LE BLANC, J. of the same opinion.

Rule refused (a).

(a) The same measure of damages was adopted in a case of *Payne v. Burke*, Sittings after Mich. Term 1799, at *Westm. C. B.* cor. *Ld. Eldon*.

Tuesday,
Feb. 9th.

The KING against The Justices of PEMBROKESHIRE.

By s. 19. of
stat. 15 G. 3.
c. 78. where
an order of
justices has
been made for
stopping up a
road, an appeal
is given to
"the party
grieved by
any such or-
der or pro-
ceeding, &c.
at the next
Quarter Ses-
sions after
such order
made or pro-
ceeding had,"
&c. held that
at all events
an appeal to
the Sessions
next after
the actual ob-
struction of the
road was too
late; the party having had sufficient notice of the order in time to have appealed to a preceding
Sessions, before which time the surveyors of the highways had begun to stop up the road.

AT the general Quarter Sessions of the peace holden for the county of *Pembroke* on the 7th of *October* 1801, Lady *Owen* moved to lodge an appeal against an order of two justices, dated the 2d of *April* 1801, whereby they ordered that the highway in the parish of *St. Michael, Pembroke*, leading from the highway from the town of *Pembroke* to the village of *Hodgston*, to the new highway in the said order mentioned, should be stopped up; on an allegation that the road so ordered to be stopped up was the only way she had from her house to a certain farm belonging to her, and that she had had no notice of the said order till after the *July* Sessions 1801. But it appearing to the Court below that the said order was made by the two justices on the 2d of *April* 1801, and returned to the Sessions and recorded on the 15th of the same month, and that it was not appealed from till the then *Michaelmas* Sessions, they refused to receive the appeal. Thereupon in *Michaelmas* Term last a rule was obtained, calling on the defendants to shew

cause

cause why a writ of mandamus should not issue, commanding them at the next general Quarter* Sessions of the peace holden for the said county to receive, proceed upon, hear, and determine the said appeal.

The affidavit of Mr. *Stokes* in support of the rule stated, that on the 17th of *July* last he as solicitor for the estates of Lady *Owen* was informed, that certain orders had been made for diverting one road, and also for stopping the road in question, which tended much to her injury. That on the 20th of *July* he examined the respective roads mentioned in the orders: that he passed and repassed on horseback over the whole of the road in question directed to be stopped up; and that the same was not in any way stopped up, obstructed, or impeded on that day; nor did it appear that any stopping up or obstruction had been made upon the same. That the Quarter Sessions were holden on the 15th of *July*, and that the deponent was informed and believed that Lady *Owen* had not by herself or agents any notice or information of such orders until the 17th of that month. That in *August* he was informed, that on the 31st of *July* last the surveyors of the highways for the parish of *St. Michael, Pembroke*, had caused a bank to be raised and a ditch to be sunk across the road in question; and thereupon the deponent prepared, and served a notice of appeal for the *Michaelmas* Sessions against the order for stopping up the same: which appeal was afterwards rejected by the said Court. One of the orders referred to by the affidavits was an order by two magistrates, dated 2d of *April* 1801, for diverting a certain highway between *Llanaston* and *Pembroke*, and turning it in another direction more commodious for the public; followed by a certificate of the same magistrates, that the new road was fit for use, and directing the old way to be stopped up. Another order was of the same date made by the same, for stopping up a cross road (the road in question) leading from the old to the new highway. Another affidavit was made by one *Morse*, stating his being employed by one of the surveyors of the highways to stop up the road in question, which he did on the 31st of *July* aforesaid, by sinking a ditch and erecting a bank across it: and that previous thereto the road was open and free for travelling; and that till then there was no stopping up or obstruction of the same, to the best of his knowledge and belief.

In answer to the rule, it was sworn by the magistrates making
the

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the orders, that by a mistake the order made by them for the use of the surveyors of the highways was filed at the Quarter Sessions on the 15th of *April* 1801, instead of the order intended to be so filed (though in substance the same): but that the mistake was rectified a few days after those Sessions, and the proper order substituted in lieu of the other. That the orders referred to were for more than ten days previous to the said last *Easter* Sessions publicly known in the parish of *St. Michael, Pembroke*, and directions given by them (the magistrates) to the surveyors of the highways in the said parish, to carry the same into immediate execution, preparatory steps having been before taken for that purpose. That they did not believe (for reasons stated by them), that *Lady Owen* sustained any injury or impediment from stopping up the road in question. That one *J. M.* for several years past had been the reputed managing agent or bailiff of *Lady Owen*, and resident on the spot, and that *Mr. Stokes* resided at the distance of twelve miles off: that *Mr. Stokes* was present at the *Easter* Quarter Sessions, when the order in question was so filed as aforesaid, and that the rolls or records of the said court were kept in his office.

[216] One of the surveyors of the highways also swore to the publicity of the said orders in the parish, and that he received them ten days previous to the *Easter* Sessions on the 15th of *April*. And several labourers who were employed upon the roads by the surveyors deposed, that on and before the 2d of *April* 1801, they were so employed to turn the old and make the new highway mentioned in one of the orders, and also to stop up the old highway and the crossway in question. That while they were turning the old highway ten days before the 15th of *April*, *J. M.*, the domestic servant and managing agent of *Lady Owen*, in company with a certain tenant of hers, came up to them and inquired what they were doing, to which they answered, that they were employed by the surveyors of the highways of the parish to turn the old and make the new road (before-mentioned), and were also directed to stop up the highway in question. On which *J. M.* then informed him, that if they stopped up the said highway, he had orders from *Lady Owen* to send men to pull down the obstruction as soon as it was made. That some short time before *July* last, the surveyors again ordered them (the labourers) to stop up the road in question, which they accordingly did by making a fence or frith across the same

same several days before the 15th of *July*, when the Sessions were holden; which frith or fence continued to remain across and obstruct the said way for several days, but was afterwards torn down by persons unknown; and afterwards again made up by *Morse* before-mentioned: that the fact of such employment of labourers for that purpose by the surveyors, was publicly well known in the parish of *St. Michael*, as they worked there for six days.

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The stat. 13 *Geo.* 3. c. 78. s. 19. enacts, "That where (in the cases therein mentioned,) any highway, &c. shall be so ordered to be stopped up or inclosed, it shall and may be lawful for any person *injured or aggrieved* by any such order or proceeding, or by the inclosure of any road or highway, by virtue of any inquisition upon a writ of *ad quod damnum*, to make his complaint thereof by appeal to the justices of the peace, at the next Quarter Sessions, &c. after such order made or proceeding had, as aforesaid, upon giving ten-days' notice in writing of such appeal to the surveyor and party interested in such inclosure, if there shall be sufficient time for such purpose: if not, such appeal may be made upon the like notice to the next subsequent Quarter Sessions, &c. which Courts of Quarter Sessions are authorized to hear and finally determine such appeal. And if no such appeal be made, or being made, such order and proceedings shall be confirmed by the said Court, the said inclosures may be made, and the ways stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever," &c.

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Erskine and *Wigley* shewed cause against the rule; and relied on the words of the Act as conclusive, that the appeal must be lodged at the next Quarter Sessions after the order made, provided there be time to give notice, otherwise at the ensuing Quarter Sessions; and therefore no subsequent Quarter Sessions can take cognizance of it. Then waving the question whether the appeal might not have been preferred at the *Easter* Sessions, at any rate it could not be deferred beyond the *July* Sessions; the order having been formally recorded immediately after the *Easter* Sessions, though in substance made and lodged before; and there having been as much publicity in it as the subject-matter would admit of, so that the party aggrieved could not complain of being surprised. That several days before the 15th of *July*, when the Sessions were holden, the road had been actually

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actually obstructed, though the obstruction was afterwards wrongfully removed by persons unknown.

Gibbs, Dauncey, and Lord, contra. The appeal is given to the party injured or aggrieved; but until the old road be actually obstructed the mere order works no grievance or injury to any one: therefore the true construction of the Act must be to give the appeal to the next Quarter Sessions after the grievance or injury sustained. For otherwise an order may be obtained behind the back of the party interested, of which he may have no notice till after the next Sessions in fact have passed, when according to the construction contended for, he would be concluded, without any opportunity of having his complaint heard: but it cannot be intended that the Legislature meant any thing so illusory and unjust. The words of the Act are, “after such order made or *“proceeding had.”* The word *proceeding* then must mean *proceeding under the order*; for it has no reference to any other antecedent matter. Now the road was not effectually obstructed till the 31st of *July*; and the appeal was made to the *Michaelmas* Sessions, which were the next in point of time: at most, there was only an ineffectual obstruction *a few days* before the *July* Sessions, which in no event would be sufficient to conclude the party aggrieved, as it does not appear to have been *ten days* previous, so as to enable her to give the notice required by the Act; in which case the appeal must be made at the next following Sessions. In *Rex v. The Justices of Staffordshire (a)*, the Court seemed to think that the question as to the time of appeal turned upon the time of receiving notice of the order. But it was not necessary to decide the point in that case, as at any rate the party applying for the mandamus to the Sessions to receive his appeal was not entitled to it, for want of ten days’ previous notice of appeal. In other cases, the construction of similar words in Acts of Parliament has been holden to be the next possible Session after notice, as in case of orders of removal (*b*). And there too, the time of appeal is reckoned from the execution, and not from the making of the order; though the words of the Act 13 & 14 *Car. 2. c. 12.* are general (*c*). So the time for ap-

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(a) 7 *Term Rep.* 81.
Yorkshire, Dougl. 192.

(b) *Rex v. The Justices of the East Riding of*

(c) *Sect. 2.* “All such persons who think themselves *aggrieved* by any such judgment of the said two justices may appeal, &c. at the next Quarter Sessions,” &c.

pealing against a poor rate is reckoned from the publication (a), and not from the making of the rate.

GROSE, J. This is an application for a mandamus to the Quarter Sessions to receive and hear an appeal against an order of justices for stopping up a certain road; and the question is, Whether the time for appealing were expired when the application was made to the Court below? whether, according to the true construction of the statute giving the appeal, the appeal be given to the next Sessions after the order made, as contended on the one hand; or to the next Sessions after the party is aggrieved, as contended on the other hand; it is unnecessary for us to determine; though I must observe, that the words of the Act are very strong, that the appeal shall be made to the next Sessions "*after such order made,*" &c. There are, however, other words upon which stress has been laid. But at any rate I am satisfied that in this instance the appeal was not made to the next Sessions after the party was aggrieved. The order of Justices was made on the 2d of *April*; and so notorious was it, that ten days before the *Easter* Sessions the labourers employed upon the road had a conversation with the managing servant of Lady *Owen* about the stopping up of this very road; and he threatened what she would do if it were stopped up. No affidavit has been made by Lady *Owen* herself, to deny that she had notice; and therefore we must presume that she had notice of all that was doing at that time. Then again some short time before *July* the same persons had further orders from the surveyors of the highways to stop up the road in question; which was accordingly done several days before the *July* Sessions, by making a fence across it. No appeal, however, was made till the *Michaelmas* Sessions following; which cannot be considered as an appeal to the Sessions next after the party was aggrieved. Her own family considered her as aggrieved by the order long before. Under these circumstances it would be too much to let the mandamus go, even if there were any doubt whether she herself had had notice till after the *July* Sessions. But if it were necessary to give an opinion on that point, it would be that she had notice of all that had been done before: and then, according to every fair construction of the statute, the time for appealing was passed.

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(a) *Rex v. Micklefield, Cald.* 512. and vide *R. v. Atkins*, 4 Term Rep. 11. and *R. v. Stanley, Cald.* 172.

1802. LAWRENCE, J. I think the mandamus ought not to go. Two different constructions of the statute have been contended for; the* one that the appeal must be to the Quarter Sessions *next after the order made*, &c.: the other that it is given to the next Sessions *after the party is aggrieved*: and it has been argued that the party is not aggrieved by the making of the order, but by the execution of it. Now it cannot be said that the Act gives the appeal to the next Sessions after the party is aggrieved; for by the express words of it, "it shall be lawful for the party aggrieved *by any such order or proceeding*, or by the inclosure of "any highway, by virtue of any inquisition on any writ of ad "quod damnum, to appeal to the next Quarter Sessions *after "such order made or proceeding had as aforesaid*," &c. It is clear that this appeal was not made to the Sessions *next after the order*. Then the only question is, Whether it were made to the Sessions *next after the proceeding*: and what is meant by the term *proceeding* there used? It does not mean acts done under the order; but is used as descriptive of some legal procedure similar to *order*; "*such order made or proceeding had as aforesaid*," refers to the *proceeding before the magistrates*, stated in the previous part of the Act. Then it is said that the party ought to have notice, otherwise the power of appeal given will be nugatory. But here there does appear to have been notice: for the labourers employed by the surveyors expressly told Lady Owen's manager what they were going to do. Whether Lady Owen, by virtue of such an order, will be precluded from the use of the road is another question, upon which it is unnecessary to say any thing at present. But upon the construction of the Act as to the time of appealing, I see no other line to go by: for otherwise it is difficult to say to what period an appeal might be deferred; it might be long after the order was executed; for the party might not have notice for months or years afterwards.

[222] LE BLANC, J. Upon either of the constructions of the statute contended for, the appellant came too late. For she neither appealed to the Sessions next after the order made, nor to that next after notice had of it. For taking the notice to Lady Owen's managing servant to be notice to her, it was an express notice of the order for stopping up the road in question. By the words of the statute, "the appeal is given to the Sessions "next after such order made or proceeding had." There could be no doubt as to the first part: but it is said that the word *proceeding*

reeding means the stopping up of the road: but by attending to the place where that word is used, it will appear that it cannot have that meaning; for in the former clause it is used as synonymous to *order*; and in the very same clause it is used in the same sense with *order*, and as distinct from the act of stopping up the road: the words being “that it shall be lawful for any person aggrieved by any such order or proceeding, *or by the inclosure* of any road,” &c. No inference can be drawn from the construction put on other Acts of Parliament, giving the appeal in different words from the present.

Rule discharged.

The KING *against* The Inhabitants of MOOR CRITCHELL.

IN consequence of the opinion of the Court, expressed in this case in the last Term (*a*), the following special order was made:

[223] “Upon hearing counsel on both sides, it is ordered, that an original order of two justices for the removal of *D. Spearing*, &c. from the parish of *Donhead St. Mary*, in the county of *Wilts*, to the parish of *Moor Critchell*, in the county of *Dorset*, and also an order of Sessions made in confirmation thereof, be severally quashed for the insufficiency thereof: it not appearing on the face of the said original order, that the said justices, at the time of making the same, were justices of the peace for the said county of *Wilts*.”

Gibbs now moved (*b*) “that the above rule might be altered, by omitting such part thereof as relates to quashing the original order of the two justices, and that the same may only order that the order of Sessions made in confirmation of the original order of the two justices be quashed; and that the justices below may be ordered to enter a continuance to the next Sessions.” The object of this rule was, he said, to enable the appellant parish to apply to the Sessions for the expence of maintenance, which by the stat. 9 *Geo.* 1. c. 7. s. 9. could only be allowed by the Sessions on appeal, and an adjudication by them purpose of enabling them to give maintenance according to stat. 9 *Geo.* 1. c. 7. s. 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the Term subsequent to the judgment so pronounced.

(*a*) Ante, 66.

(*b*) Notice of the intended motion was previously given to the attorney for the parish of *Donhead*.

1802.

The KING
against
The Justices
of
PEMBROKE-
SHIRE.

Wednesday,
Feb. 10th.

If an order of removal be confirmed at the Sessions, and both orders be afterwards removed into *B. R.* by certiorari on a case reserved, and this Court disapprove of the orders for want of jurisdiction of the removing magistrates appearing on the face of the original order; this Court will quash both the orders, without remitting the matter back to the Sessions to quash the original order, for the

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The KING
against
The Inhabi-
tants of
MOOR CRIT-
CHELL.

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that the pauper was unduly removed: which judgment would now be obtained, as their former erroneous opinion had been corrected by the decision of this Court. And he referred to *Rex v. Yarpole (a)*, where an order of removal having been confirmed by the Sessions on appeal; and this Court having afterwards determined (on a question reserved for their opinion) that so many of the justices below as concurred in that judgment were disabled to vote on the particular question by reason of having an interest in one of the parishes concerned, so as to reduce the number to a minority in respect to those who voted for quashing the order; yet this Court would not quash the original order, but referred the case back to the Sessions; directing them to enter a continuance to the next Sessions in order that they might make the order for quashing, &c. which ought to have been made at first.

Burrough and *Casherd* shewed cause in the first instance; and said, that the direction given in the case cited was not warranted by the general practice of the Crown-office, and had not been followed up by the directions of the Court in subsequent cases. That it was contrary to what was done in *Road v. North Bradley (b)*; where this Court exercised a jurisdiction not only over the judgment of the Sessions, but also by quashing an antecedent order of justices, being properly quashable on appeal. They also referred to various subsequent cases (*c*) where the form of the judgment was at variance with *Rex v. Yarpole*. And contended further, that the common practice was right on principle; for when all the orders were brought before the Court by certiorari, its jurisdiction attached upon them so as to deal with them as justice required. That at any rate this case was distinguishable from *R. v. Yarpole*; for here the objection made went to the merits of the original order itself, to which the attention of the Court was called, as well as to the order of Sessions; whereas there the objection went only to the order of Sessions. But

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however incorrect the judgment of this Court had been, it was now too late to revise it upon motion; being a judgment of a term passed, and not now impeached on the ground of any clerical mistake, but for error in judgment.

(a) 4 Term Rep. 71.

(b) 1 Stra. 1168.

(c) *Rex v. Birdbrooke*, 4 Term Rep. 245. *Rex v. Hinckley*, ib. 571. *Rex v. Darlington*, ib. 797. *Rex v. Bilton, &c.* 1 East, 13. and ib. 239. 217. 373. 597. and 2 East, 25 & 63.

GROSE, J. Both orders were regularly before the Court in the last Term. We then did what we thought right with them, and pronounced our judgment; and it is too much to apply now to rescind it.

Per Cur.

Rule refused.

1802:

The KING
against
The Inhabi-
tants of
MOOR CRIT-
CHELL.

HARRISON *against* FRANCO.

Thursday,
Feb. 11th.

UPON a rule to shew cause why the proceedings should not be set aside for irregularity, the question was, whether the pleas should have been filed, or whether it were sufficient to have delivered them, as had been done. The pleas were the general issue, and plene administravit; neither of which separately need be filed (*a*), as was admitted; but being pleaded together, it was contended they ought to be filed like all other double pleas, which must be pleaded by leave of the Court. And of this opinion was *The Court*, after consulting the Master; and made

All double
pleas must be
filed, and not
merely deliv-
ered to the
plaintiff's
attorney;
though two
pleas be
pleaded, which
separately
used only have
been deliver-
ed.

The Rule absolute.

Laues in support of the rule.—*Marryat* contra.

(*a*) Vide 1 *Tidd*, 599.

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The KING *against* DR. WYNN.

Thursday,
Feb. 11th.

AN indictment was found at the Sessions against the defendant for an aggravated misdemeanor, to which he had pleaded. And now the record having been removed hither by certiorari, a rule was obtained on the part of the prosecutor for quashing the indictment for error apparent on the face of it; another more perfect indictment being as was said prepared and intended to be preferred.

The Court
will not quash
a defective
indictment on
the motion of
the prosecutor
after plea
pleaded, be-
fore another
good indict-
ment be found.

Jekyll on behalf of the defendant shewed cause against the rule; contending that after plea pleaded the Court would not quash an indictment; according to *Rex v. Frith* (*a*): at least not unless another indictment were found, which might be substituted in lieu of the other; *R. v. Webb* (*b*): and this too passed by consent; which he said he was not authorized to give in this

(*a*) 1 *Leach*, 12.

(*b*) 3 *Burr.* 1468, and vide 2 *Hawk. c.* 25. s. 146, &c. and 3 *Bac. Abr.* 573, where all the cases are collected; and *Rex v. Stratton, Dougl.* 239.

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The KING
against
Dr. WYNN.

case, unless upon certain terms: (which were not acceded to by the prosecutor).

Dampier for the prosecution said, it would be nugatory to proceed to trial on an indictment palpably defective, and when another was prepared and was intended to be preferred as soon as possible. That there was no occasion for the defendant's consent, if the Court saw sufficient reason for quashing it on the motion of the prosecutor: and no injury could ensue to the defendant, as the prosecutor could not be forced on to trial before the summer assizes.

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The Court having consulted with the officers of the Crown-office,

GROSE, J. said, that he was not aware that the consent of the defendant was necessary for quashing an indictment even after plea pleaded; but that the Court had laid down a rule to govern their discretion in such cases in general, in order to avoid collusion: and therefore they thought it more advisable to let this rule be enlarged, so as to give time to the prosecutor, if so advised, to prefer another indictment before they disposed of the present rule.

Rule enlarged.

Friday,
Feb. 12th.

HAMMONDS and Another, Executors of BLIGHT, against BARCLAY and Others, Assignees of FENTHAM a Bankrupt.

A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts; and then the principal dies; and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same: held that the factor has a lien upon the proceeds as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due.

THIS was an action of assumpsit for money had and received by the defendants for the use of the plaintiffs; to which the general issue was pleaded. At the trial at *Guildhall* before Lord *Kenyon*, C. J. a verdict was found for the plaintiffs with 255*l.* 19*s.* 6*d.* damages, subject to the opinion of this Court on the following case:

In April 1799, the testator *J. Blight*, who was then resident in *Jamaica*, and the owner of the ship *Julius Caesar*, having on board a general cargo on freight for *London*, addressed the said ship to *Fentham* his correspondent in *London*; and wrote him a letter dated [225] the 17th of that month to this effect: "I am

"now loading the ship *Julius Caesar* for *London*, addressed to you.

"and

“and I requested you to effect insurance on freight of the
 “ship 4000*l.* sterling; say 4000*l.* sterling on ship *Julius Cæsar*,
 “*James Adams*, master, from *Black River*; warranted to sail with
 “convoy. I have also to request you to effect a further insurance
 “on 50 tons of logwood.” This letter was received on the
 30th of *July* following. On the 9th of *May* in the same year
Blight wrote a second letter to *Fentham*, which arrived in
Angst following; in which he says: “I hope my letters
 “arrived in time for you to effect the insurance on the freight
 “of the ship *Julius Cæsar*, as I mean to draw on you for 2000*l.*
 “sterling in part. You have my instructions to sell this vessel
 “as soon after her arrival as possible. I think she will on in-
 “spection command 5500*l.* sterling, ships being much in de-
 “mand: but at all events sell her.” On the 1st of *May* the
 ship sailed from her port of loading for her place of rendezvous
 at *Jamaica* to join convoy. And on the second of *June* *Blight*
 died; intelligence of which event having reached Captain
Adams before the ship’s departure from the place of rendezvous,
 he applied to the plaintiffs as executors, both of whom then re-
 sided in *Jamaica*, for instructions how to proceed; who there-
 upon directed Captain *Adams* to follow the instructions he had
 before received from the testator. In consequence of the above
 two letters from *Blight*, *Fentham* effected an insurance on the
 freight of the *Julius Cæsar*, the premiums of which amounted to
 98*l.* 10*s.*: but a return of premium was afterwards made to the
 amount of 570*l.* And he also accepted three bills of exchange
 drawn upon him by *Blight*, two of which bills he duly paid be-
 fore his bankruptcy to the amount of 650*l.*: and the remaining
 bill for 1000*l.* is now outstanding against him. The said in-
 surance was effected, and the acceptances were given, by *Fen-*
tham before the ship’s arrival in *England*, and before he had re-
 ceived any intimation of the death of *Blight*. On the 30th of
September the *Julius Cæsar* arrived at *London*, and the captain,
 in consequence of the instructions he had previously received,
 immediately put her under the charge of *Fentham*, and delivered
 over the ship’s register to him: after which the latter disbursed
 a further sum for seamen’s wages and the necessary use of the
 ship to the amount of 490*l.* 3*s.* 6*d.* On the 14th and 21st of
July in that year the plaintiffs wrote to *Fentham* from *Jamaica*,
 which letters were respectively received by him on the 3d and
 16th of *September* following: in the first of which, after com-

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 against
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 against
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municating the death of *Blight* and their appointment as his ex-
 ecutors, they say, "The *Julius Cæsar*, after incurring a very
 "extraordinary expence in her outfit, &c. sailed with the last
 "fleet:" and in the second letter they say, "We observe you
 "have effected insurance to the amount of 4000*l.* sterling on
 "freight, and 2000*l.* on logwood, *per ship Julius Cæsar*. As
 "the wood has not been shipped, you will of course have the
 "policy cancelled, and the necessary returns for short interest
 "made. Captain *Adams's* account is likewise unsettled; but
 "as Mr. *Hammonds*, who has copies of his several accounts,
 "will be in *London* about the time you receive this, you will be
 "able to settle with him." Soon after the arrival of the ship,
Fentham gave directions to Messrs. *Hopkins* and *Gray*, ship-
 brokers in *London*, to sell the ship and collect the freight.
 Shortly after which *Fentham* became bankrupt, and a commis-
 sion issued against him, under which the defendants were chosen
 assignees. Since which time Messrs. *Hopkins* and *Gray* have
 sold the ship and collected the freight due upon the said voyage,
 and have accounted with the defendants, and paid over to them
 the sum of 2556*l.* 19*s.* 6*d.*, part of the net proceeds thereof.
 The question for the consideration of the Court was, whether
 the defendants as assignees of *Fentham* have any, and what lien
 upon the ship, or freight, or the proceeds thereof; so as to be
 entitled to set off in this action the whole or any part of the dis-
 bursements or acceptances.

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Dickens for the plaintiffs admitted that the defendants were
 entitled to set off 490*l.* 3*s.* 6*d.* disbursed by the bankrupt for the
 seamen's wages, and the necessary use of the ship after her ar-
 rival at *London*. But as to the remaining sums, he contended
 that the defendants had no lien on the proceeds of the ship:
 1st, because no property in the ship was vested in *Fentham* by
 the testator, but only an authority which was countermanded
 by his death. 2ndly, Because in no case where an action is
 brought by executors in their own name, can a defendant set off
 a debt due to him from the testator. [This last argument
 however was afterwards abandoned; the Court thinking the
 question of set-off strictly did not arise in this case; but only
 whether in this form of action founded in equity and conscience
 the plaintiffs were entitled to recover: and which was in truth
 the question agreed to be tried between the parties.] As to the
 principal question, though if a factor have advanced money for
 his

his principal on the faith of an intended deposit, he may set off his demand or have a lien for it, if the deposit be made; yet he can have neither, unless the goods come into his hands by the delivery or on account of the principal. And in no case can there be a lien where the property has changed hands in the mean time before it came into the possession of such factor. Suppose, after the factor had advanced money on the faith of such intended consignment, the owner had sold the ship to a *bonâ fide* purchaser, (e. g. the present plaintiffs,) by whom it was afterwards put into the possession of the same factor, he could have no lien in respect of his former advance to the original owner. His only remedy in such case would be by action; as was said by Lord C. B. *Eyre* in delivering the opinion of the Judges upon the case of *Kinloch v. Craig (a)* in the House of Lords. In that case, as in the present, the factors had accepted bills drawn upon them by their principals, on the faith of intended consignments to be made to them; but before those consignments arrived they had stopped payment, and afterwards became bankrupts: and it was determined, that as there was no actual delivery of the goods to them before, there could be no lien. A lien can only attach while the property remains in the original debtor. Here *Blight* did no act in his lifetime to vest the property in *Fentham*: on *Blight's* death therefore it vested by operation of law in the plaintiffs his executors; and this before it got into the possession of *Fentham*, who had nothing but a bare authority. If notwithstanding *Blight's* death *Fentham* had put up the ship to sale, or the captain had delivered it to him without the authority of the plaintiffs, it would in either case have been a wrongful act. On the contrary, the captain having received the instructions of the plaintiffs, and *Fentham* having accepted the ship in consequence, he thereby became the agent of those who were the legal owners, and accountable to them. [He also suggested another fact, which was not stated in the case, but was not now disputed, namely, that after the ship got into *Fentham's* hands the plaintiffs countermanded the sale.] At any rate there is no colour for any lien for the amount of the acceptance outstanding; which is never considered as payment, and probably in the event may

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(a) 3 Term Rep. 783-7.

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 against
 BARCLAY.

never be paid. In *Kinloch v. Craig* (a), Mr. Justice *Ashhurst*, in delivering the opinion of the Court observed, that there was a great difference in this respect between *payment* and a *liability* to pay. In *Lickbarrow v. Mason* (b) acceptances were given by the consignee; and yet it was holden that the consignor might stop the goods in transitu on the insolvency of the former.

[233] *Warren* contra said, that the whole of the plaintiff's argument turned upon a fallacy, in assuming that they claimed in a different right from the testator; whereas they took it subject to every charge equitable and legal with which the testator himself held it. Therefore if he had given any charge irrevocable upon it, they took it accordingly; if revocable, they might have revoked it; but not having done so, the same lien attached upon it when it got into *Fentham's* possession as would have been the case had *Blight* lived. He might have revoked the consignment as well as his executors, and then *Fentham* could only have had his remedy by action against him: the executors could have done the same, subject to the like consequence; but they did not revoke it, but confirmed the act and authority of their testator, as they were bound in conscience to do. Therefore the ship came into *Fentham's* hands with all the consequences of the original consignment, and not as from a new purchaser. *Fentham* had something more than a bare authority from *Blight*; he had an authority coupled with a contract. He accepted the bills upon an engagement that he should have the ship to sell, out of which he was to be repaid. A bare authority is such as may be revoked without any consequence; but *Blight* could not have revoked the consignment without subjecting himself to an action for a breach of contract; he was under an obligation to fulfil his contract, and that obligation attached upon his executors. In *Kinloch v. Craig* the agreement was stated to be executory till the delivery of the goods to the factor: that shews that after the delivery it becomes executed, and can no longer be rescinded. Then if a testator enter into an agreement which is executory, and after his death his executors do not rescind it, but suffer it to be executed, it becomes so with all the consequences which would have resulted from its execution in the lifetime of the testator. This is very different from the case

(a) 3 *Term. Rep.* 122. This was the first time that case came before the Court.
 (b) 2 *Term Rep.* 63.

supposed, that the plaintiffs stand in the same situation as if they were common purchasers of the vessel; for the titles of vendor and vendee are opposite and adverse; but that of an executor is continuing and affirmative of the title of his testator. If a vendee of the ship had rescinded such a contract made by the vendor to the factor, no action would have lain against him; but it is otherwise in the case of an executor. But though the relation between *Fentham* and *Blight* were at an end, yet the former would retain his lien as agent of the executors, who authorized the captain to execute the orders he had before received from the testator; which implies an authority to *Fentham* to sell and retain for his original lien. Then as to the acceptance for 1000*l.* still unpaid, for which the lien is particularly objected to; what was said by *Ashhurst, J.* was beside the principal point in judgment; and besides it was said with reference to the primary question of stopping in transitu; as not precluding that right in the consignor: but it does not follow from thence, that when the transitus is ended and the consignee has got possession of the goods, the lien does not attach: and indeed it was expressly so considered in the same case. And that opinion is founded in justice. The factor is induced to give his acceptance, and make himself liable for the debt of the principal, upon the faith of the consignment, by which the condition of the factor is materially altered; and it is contrary to justice and equity to withdraw the consignment without putting the factor in the same situation as before. It is sufficient in all cases to establish a lien that the goods should have come into the possession of the consignee, and that he should have made himself liable to answer by his acceptance for the benefit of the consignor. *Drinkwater v. Goodwin, Cowp.* 251.

Dickens in reply said, that nothing could be collected from the facts of the case to shew that the plaintiffs intended so to ratify the testator's acts as that the bankrupt should have a lien for his original demand; for they did not even know what had been done till sometime after the orders to the captain were given; and they cannot be taken to have ratified the original contract by implication; as they might thereby be guilty of a devastavit in preferring a simple contract debt to one of a higher nature; which would not be presumed against them. That in *Kinloch v. Craig* a constructive possession, as by paying part of the freight, was deemed not sufficient to give a lien; but that at all events

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events no possession could so operate unless it came to the party by the authority of the principal. That in *Drinkwater v. Goodwin*, the bond, in which the factor had joined as a security for his principal, and for which he claimed to have a lien, was paid by him before the action brought: but here the acceptance for the bill of 1000*l.* is still unsatisfied.

Curia advisare vult.

GROSE, J. now delivered the opinion of the Court. In this case the plaintiffs claim, not in form but in substance, as executors of *James Blight*, a sum of money 2556*l.* 19*s.* 6*d.*, the produce from the sale of the ship *Julius Cæsar* received by the defendants as assignees of *Fentham* a bankrupt: and the question is, Whether, as such assignees, they have any, and what lien upon the ship, or freight, or proceeds thereof; so as to be able to set off what has been paid by *Fentham* in the disbursements and acceptances stated in the case? A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied. That the defendants have a right to retain 490*l.* part of the sum insisted upon as due to the defendant, is admitted. That they have no right to retain 312*l.* 10*s.*, the balance of premiums paid upon the insurance account, nor the 650*l.* upon the bankrupt's acceptances, nor that which the defendants are liable to pay on the acceptance of the bill for 1000*l.*, is insisted: because whatever authority the testator gave was countermanded by his death. The evident consideration upon which the premiums for insurance and the amount of the two bills were paid, and the third accepted, was the consignment of the ship and cargo: and it does not seem very consistent with justice to say, that after the consignee had advanced the premiums, and paid bills on the credit of the consignment, the death of the consignor should operate as a revocation, so as to prevent the bankrupt and his assignees having the fruits of that which was the foundation and consideration upon which he disbursed his money. But as between the plaintiffs, his executors, and the bankrupt, (and his assignees stand in his shoes,) there is another clear decisive answer; which is, that they affirmed the orders of their testator, and directed the captain to follow the instructions before received from him, which were to effect insurance on freight of the ship 4000*l.* sterling, as he meant to draw on him for 2000*l.* in part; to sell the vessel as soon after her arrival as possible;

possible; at all events to sell her. Then the plaintiffs write to the bankrupt affirming his acts; ordering him to get a return of premium on account of logwood not shipped; and to settle Captain Adams's account. By their authority then he was in possession of the ship, and is entitled to retain out of the proceeds whatever he has expended by the testator's or their order; they standing in the shoes of the testator, and representing him, as the defendants represent the bankrupt. Upon these grounds we are of opinion that there is no foundation for the above objection; but that the bankrupt having been in possession of the ship, and having sold it, and received the proceeds both by the authority of the testator and the plaintiffs his executors; and that the money being paid and the bills accepted upon the credit of the ship and cargo consigned to him; his assignees, the defendants, have a lien upon such proceeds for the several sums of 312*l.* 10*s.* for premiums advanced; 650*l.* money paid on two bills accepted; and 490*l.* sailors' wages; and for such sum as they shall be compelled to pay upon the third acceptance for 1000*l.*; and that the case of *Kinloch v. Craig*, the authority of which was relied on to prove that the bankrupt had no lien for the acceptance which he has not paid, does not rule this case. For there *Sandiman* and Co. had never possession of the property on which they claimed a lien, as *Fentham* had in this case: and that case only determined that a person making himself liable by his acceptances did not thereby prevent the consignor's right of stopping in transitu, in case of his insolvency: and it did not decide, that when a man had in his possession the effects, on the credit of which he had made acceptances, that he might not retain those effects until he was indemnified against the liability to which he had subjected himself.

Postea to the Defendants (a).

(a) Vide *Conland v. Stein*, 8 Term Rep. 199, where the principal was a bankrupt at the time of the consignment, the factor who had accepted, and paid bills drawn on him by the principal on the faith of such consignment, was held accountable to the assignees of the principal for the value of it.

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Friday,
Feb. 12th.

DOE, on the Demise of WILLIAMS, against HUMPHREYS.

A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment; held the second notice was no waiver of the first.

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THIS was an ejectment, tried at the last Summer assizes for *Shrewsbury* before *Lawrence, J.* to recover possession of a farm in the parish of *Nammerch* in the county of *Flint*, which the defendant held as tenant from year to year to the lessor of the plaintiff. The farm consisted of lands of different descriptions to be quitted at different times; the arable on the 29th of *September* 1800; the pasture and meadow on the 30th of *November*; the dwelling-house, &c. on the 1st of *May* 1801. The lessor, in order to determine the * defendant's interest in the premises in question, served him on the 21st of *March* 1800 with a notice to quit the farm at the several times above stated; and the defendant not having quitted the arable on the 29th of *September*, nor the meadow and pasture on the 30th of *November*, the lessor brought his ejectment in the Court of Great Sessions for the county of *Flint* against the defendant; pending which ejectment, he delivered to the defendant another notice (a), dated the 20th of *March* 1801, to quit the messuage and dwelling-house called, &c. which he then held under him, together with the lands, &c. thereunto belonging, to wit, the arable on the 29th of *September* 1801, the meadow and pasture on the 30th of *November*, the dwelling-house, &c. on the 1st of *May* 1802. It was objected at the trial that the second notice was a waiver of the first, being a recognition of the tenancy still subsisting. But the objection was over-ruled, and a verdict taken for the lessor of the plaintiff, with leave to the defendant to move to enter a nonsuit; or if the lessor were only entitled to recover part, to enter a verdict for such part. A rule nisi for that purpose was accordingly obtained in *Michaelmas* Term last; against which, in the same Term,

Gibbs, Manley, and Wynn, shewed cause, contending that the second notice was no waiver of the first; for it was given after the ejectment commenced, and pending the prosecution of it, which was not abandoned; which rebutted the presumption of

(a) The second notice was copied verbatim from the first, with the alteration only of the dates; and the reason suggested at the bar why it was given was, because the person who was to prove the service of the first notice was dangerously ill, and it was apprehended that the lessor would not be able to prove the notice.

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any intention in the lessor to wave the first notice. The only reason for * giving it was in case the lessor should not be able from circumstances to avail himself of the first notice. That every contract for letting must be mutual; but if the defendant had an option to consider the second notice as a waver, or not, without the concurrence of the lessor, there would be no mutuality. That at the time it was given the defendant had become a trespasser, at least as to part of the lands; and therefore it could not reinstate him as tenant, without a new agreement between the parties. And they relied on *Messenger v. Armstrong (a)*, where after a notice at the expiration of the lease, a second notice, delivered to the tenant after the expiration of the first notice, to quit on a *subsequent* day, or to pay double rent, was holden to be no waver of the first.

Leycester and *Gleal* contrà insisted that the second notice was waved by the first, inasmuch as it was absurd and nugatory to give such second notice if the landlord meant to abide by the first; and also because he therein expressly recognized the defendant to be his tenant; for he gave him notice on the 20th of March 1801 to quit the premises *which he THEN held under him*. That there was mutuality in this case; for the tenant assented that the first notice should be waved by continuing to hold on. That if the landlord did not mean it as a waver, he should have said so, as was said in effect in *Messenger v. Armstrong*, by claiming double rent of the tenant if he did not quit; and there too the double rent was already incurred. That at any rate it was a question for the jury to say whether it were intended as a waver or not, according to *Doe d. Cheney v. Batten (b)*.

Curia advisare vult.

GROSE, J. now delivered the opinion of the Court. (After stating the facts as before set forth.) The defendant insists that the second notice is a waver of the first; and that he was not bound to quit at the times mentioned in it. In the course of the argument it was admitted that if the plaintiff had not intended that the second notice should operate as a waver of the first, he might have so explained his intention, by adding that the purpose of the second notice was to enable him to recover the premises at a subsequent assizes, if by any accident he

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(a) 1 Term Rep. 53.

(b) Cowp. 213.

should

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should fail at those then ensuing. And under the circumstances of this case we are of opinion that the defendant must have so understood this notice; for it was necessary to give a notice previous to the then next assizes, to enable the plaintiff to determine the defendant's interest on the 29th of *September* following, if he had not succeeded at the next assizes; which circumstance furnished an obvious reason for giving the second notice, differing from an intent to wave the first: and it was not possible for the defendant to suppose the plaintiff intended to wave the first notice, when he knew the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out of the farm. Lord *Kenyon* (a) agrees with us in opinion that the plaintiff is entitled to recover; and the rule must be discharged.

(a) His Lordship was in Court when the case was argued.

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Friday,
 Feb. 12th.

A rule to bring in the body, tested on the day of the return by the sheriff of cepi corpus, though issuing afterwards in the vacation, is irregular.

The KING against The Sheriff of LONDON.

THIS came on upon a rule for setting aside an attachment against the sheriff for not bringing in the body, in a cause of *Duffy v. Brooke* and others. On the 24th of *November* 1801, a special capias issued, returnable in 15 days of *St. Martin*; to which the defendants gave a bail bond; the writ was returnable the 25th. On the 26th the rule was served to return the writ; on the 27th the sheriff returned cepi corpus. On the 2d of *December* bail above was put in, which was excepted to, and notice thereof served on the 7th; and on the 9th a notice of justification was served for the first day of *Hilary* Term. On the 7th of *January* 1802, the rule was served to bring in the body; which rule bore teste on the 27th of *November* preceding, being the day on which the sheriff returned cepi corpus. On the 23d *January* the bail were rejected; and notice of adding and justifying was served for the 26th. On the 25th an attachment was granted against the sheriff; and the rule for the attachment served on the defendant's attornies on the 26th; and the attachment afterwards issued; and on the same day bail were added, but did not attend to justify. On the 27th bail justified, but no proceedings were had to set aside the attachment till the 1st of *February*.

Yates shewed cause against the rule; and as to the principal objection, that the rule to bring in the body bore teste on the

27th

27th of *November*, the same day the return of cepi corpus was made; he observed that the rule, though tested on that day, did not in fact *issue till the 7th of *January* following, and in fact after the return of cepi corpus; and that it was competent to the party to shew the true time of its issuing, as in other cases, in order to forward the justice of the case; and for the same purpose the fraction of a day may be allowed. And he cited *Steward v. Smith (a)*, where it was holden that a scire facias might be sued out against the bail on the day on which the *Ca. Sa.* was returnable, as the Court would intend that it issued after the sheriff's return to the writ against the principal; and also *Shivers v. Brooke (b)*, where the same principle was recognized.

Lawes, contrà, contended, that the rule to bring in the body was irregular, being tested not only before the day given for the return of the writ, the rule to return the writ being served on the 26th of *November*, which would not expire (*Sunday* intervening) before the 2d of *December*, of which the sheriff might avail himself, though he in fact returned the writ before; but the rule to bring in the body was also irregular, because it bore teste on the 27th *November*, the day on which the return of cepi corpus was in fact made. Now according to *Hutchins v. Hird (c)*, the sheriff ought not to be ruled to bring in the body, till the day after the expiration of the rule to return the writ. And in *R. v. 'The Sheriff' of Cornwall (d)*, it was holden that a rule calling on the sheriff to return a writ, being tested in the Term subsequent, though issued in the vacation, was irregular; and an attachment grounded thereon set aside.

Cur. adv. vult.

GROSE, J. delivered the opinion of the Court.

The question is, Whether the rule to bring in the body, being served in vacation, but appearing on the face of it to be made before the return, by the sheriff, of cepi corpus, be regular? And we are of opinion that, for the sake of congruity upon the face of the proceedings, the rule to bring in the body, which from its nature ought not to be made till after the return of cepi corpus, is irregular, if it appear upon the face of it to have been made before such return. Therefore the rule must be made absolute.

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(a) 2 *Stra.* 866. and 2 *Ld. Raym.* 1567.

(b) 8 *Term Rep.* 628.

(c) 5 *Term Rep.* 479.

(d) 1 *Term Rep.* 552.

1802.

Friday,
Feb. 12th.BLACKBURN *against* STUPART.

A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on.

THE defendant was taken in execution at the suit of the plaintiff, on the 31st of *March* 1798, and remained in custody of the sheriff's officer till the 4th of *April*, when he was discharged on an express undertaking that he should pay half the debt and costs then, and the other half at a future day, and that the judgment should stand as a security for the payment in three months; and if the money were not paid in that time, the defendant agreed that the judgment should be enforced by execution against his person or goods for the amount, and for the costs incident thereto. The defendant having made default, the plaintiff, long after the three months were expired, arrested the defendant for the remainder of the debt and the additional costs, which the defendant paid in order to procure his discharge: and then moved on a former day to set aside the execution, and that the money in the sheriff's hands should be refunded: and, a rule nisi having been granted;

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Park now shewed cause against the rule, and observed, that though it were true in general that a person could not be taken in execution twice on the same judgment; yet a defendant might waive that principle by an express agreement; and that this distinguished the present case from that of *Tanner v. Hague* (a), where there was no such express agreement.

Erskine and *Espinasse*, *contrà*, relied on *Tanner v. Hague*, and *Thompson v. Bristow* (b), as in point.

And of that opinion were the Court: and

GROSE, J. said, that it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not: and therefore though the defendant's conduct had been very scandalous, yet the rule must be made absolute.

(a) 7 *Term Rep.* 420.(b) *Qto. Barnes*, 205.

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The KING *against* The Inhabitants of GREAT MARLOW.Friday,
Feb. 12th.

A Rule was granted in the last Term, calling upon the prosecutor to shew cause why a certain warrant of appointment of *James Field* to be one of the overseers of the poor of the parish of *Great Marlow*, in the county of *Bucks*, should not be quashed, upon notice of [245] the rule to be given to the said *J. Field*. This was obtained on reading the said warrant of appointment returned by certiorari into this court, and also upon the affidavits of *H. Goldsmith* and others; which stated that Sir *W. C.* and the Rev. *T. P.* two Justices of the Peace for the said county, met at *Great Marlow* on the 18th of *April* last, and did then and there, by warrant under their hands and seals, appoint *J. Webb*, *J. Johnson*, *J. Gosling*, and *R. J. Oxlade*, to be overseers of the poor of the said parish. That on the 2d of *May* last another instrument, purporting to be a warrant appointing *J. Field* overseer of the said parish, was signed by *T. W.* Esq. another magistrate of the county, and on the 25th of the same month, was signed by the said *T. P.* (one of the magistrates first mentioned), who was not present when the said *T. W.* signed the same; nor was the said *T. W.* present when the said *T. P.* signed it.

In answer to the rule it was sworn that the two last-mentioned magistrates met at *Great Marlow* on the 2d of *May*, when *J. Gosling*, one of the overseers first appointed, came before them, claiming to be exempted from serving parish offices by virtue of a certain certificate of an appointment (annexed to the affidavit), dated 6th *March* 1795, whereby it appeared that he had been sworn one of the yeomen in ordinary of his Majesty's body guard. That the two magistrates, conceiving it right to exempt him, did accordingly do so; and in his stead did proceed to appoint the said *J. Field*, a substantial householder of the parish, who was agreed by the other overseers and several other parishioners present at the meeting to be a proper person. That the appointment was accordingly directed to be made out, and the said *T. W.* signed the same at the time, conceiving that it was also signed at the same time by the other magistrate: and that if it were not so done, it was by the mistake of the clerk. That at the said meeting *J. Gosling* declared that he had not

After an appointment of 4 overseers for a parish by the magistrates at one meeting, they are functi officio; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the Sessions to get his discharge. And this objection to the second appointment may be disclosed to this Court on affidavit, upon the removal of the appointment hither by certiorari, who will thereupon quash the same. *Scilicet* also, that the magistrates making the appointment must be together at the time the act is done.

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and would not act as overseer under the first appointment, conceiving himself to be exempted.

Gibbs and Reader, against the rule, took a preliminary objection, that the Court could not look into affidavits, in order to quash the appointment, which was good upon the face of it: but that the objection, if any, should have been taken upon appeal to the Sessions: and that without having recourse to the affidavits, no objection could arise from the number of overseers before appointed for the same parish being sufficient in law, as the first appointment was not returned before the Court by certiorari.

Park and G. N. Best, in support of the rule, contended that the objection to the appointment might be disclosed by affidavit: that it must have been so done in the case of *The King v. The Overseers of Bridgewater* (a); and in *Rex v. Butler* (b), and *Rex v. Merchant and Allen* (c). For in no other way could the facts there stated have appeared to the Court. That it was clear the appointment in question was bad for these, amongst other, reasons: 1st, That it was a judicial act, and ought to have been executed by both the magistrates at the same time, according to *Rex v. Forest* (d): and 2dly, That the magistrates had no authority, after the first appointment made of four overseers, to appoint another, except in the three cases provided for by the stat. 17 Geo. 2. c. 38. s. 3. namely, the death, removal, or insolvency of one of the overseers; neither of which had happened here. And that objection might be taken here on removal of the appointment by certiorari, without appealing to the Sessions in the first instance.

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LAWRENCE, J. The jurisdiction of this Court to examine into the legality of the appointment in the first instance may arise on this, that if there were a proper number of overseers legally appointed before, according to the provisions of the statute, a subsequent appointment of another overseer is merely void; the magistrates having no jurisdiction to make it. And the want of jurisdiction in the magistrates below is always a sufficient ground for the interference of this Court.

The Court, being desirous of making inquiry how the practice stood relative to the hearing of affidavits in support of objections against appointments of magistrates, which, upon the face of

(a) *Cowp.* 139.(b) 1 *Blackst.* 649. and 1 *Const.* 10.(c) *Ibid* 21.(d) 3 *Term Rep.* 38.

them, were good, directed the matter to stand over: and on this day, after hearing cause shewn upon the affidavits, in answer to the rule, when the former preliminary objection was also insisted on, they delivered their opinions.

GROSE, J. When this matter was first mentioned I thought that the objections should have been made on appeal; but I find now that the appointment may be brought hither by certiorari in the first instance, for the purpose of being quashed. And upon looking into the affidavits, which upon inquiry is found to be the usual practice, the appointment appears to be bad on both the grounds of objection taken. When the first appointment was made, on the 18th of *April*, of four overseers, all further jurisdiction of the magistrates in that respect was at an end. It was not competent for other magistrates to make a new appointment in cases not authorized by the statute. Then again, both the magistrates ought to have been present when the appointment was executed: instead of which, many days elapsed between the signature of the one and the other, and they were not together when the act was done. This is essentially necessary to be observed, and much inconvenience may ensue from a contrary rule. Therefore the appointment appearing to have been illegally made must be quashed.

LAWRENCE, J. The objection to looking into affidavits upon such a subject, for the purpose of founding an objection to the appointment, was never taken before. The *Bridgewater's* cases, *Rex v. Holloway and others*, and *Rex v. Beale and others*, *East. and Trin.* 14 *Geo.* 3. and the *Milbourne Port* cases, *Rex v. Baunton and others*, and *Rex v. Scott and others*, *Mich. and Hil.* 15 *Geo.* 3., were all motions to quash appointments of overseers, which came on upon affidavits, besides the cases mentioned at the bar. I find it also to be the common practice with respect to orders made by commissioners of sewers. Then as to the merits of this case: it must be taken on these affidavits, that the magistrates who first met did appoint four persons to be overseers of the poor for the parish: that one of the persons so appointed afterwards applied at a subsequent meeting of magistrates to be discharged on the ground of an exemption claimed by him. But after the former appointment it was not competent to the other magistrates to receive his excuse; but the party should have appealed to the Sessions, who might have allowed his excuse. But till that were done he became overseer

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completely by the appointment under the hand and seal of the magistrates, and he might have been indicted for not executing the office. I should also be sorry to relax the rule that the two magistrates should be together when the appointment is made: otherwise it will be hard to say to what length of litigation the question may not be carried, if it be to depend on the mind of the magistrate who first signed going along with the other, at the time he signs, as has been argued in support of the order. However, it is not necessary to decide any thing on that ground in the present instance.

LE BLANC, J. The Court has been in the habit of entertaining motions of this sort on affidavit; which brings the question to the validity of the appointment in the present instance. Now the first appointment being good, all was at an end, and the other magistrates had no jurisdiction to make another appointment. Then, on the other point, we cannot say that an appointment under hand and seal, and a mere concurrence to such an appointment by another, are the same thing.

Appointment quashed.

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Friday,
Feb. 12th.

PRINCE against BLACKBURN.

If a subscribing witness to a deed be abroad, out of the jurisdiction of the Court, and not amenable to its process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad.

DEBT on bond. Plea non est factum. This cause was tried the day before at the Sittings before *Le Blanc, J.* when a verdict was taken for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit. And such motion being now made accordingly, the learned Judge reported the evidence to be this: There were two witnesses to the bond, one of whom was dead; the other was *Richard Prince*, son of the plaintiff, who left this country for *America* in *October* last, before the action was brought. Two letters had been received from him since, one dated at *New-York*, the other at *Baltimore*, in *America*. It further appeared, that previous to his departure he was a single man living with his father as part of his family, on whose account he went to *America* to transact some business. But the witness who proved this at the trial, who was a servant in the plaintiff's family, did not know whether the son were expected to return to this country or not: he was not acquainted with the son's intentions. Under these circumstances the evidence of the hand-writing of both the witnesses was admitted, on

the

the ground that the subscribing witness, who was still living, was out of the reach of the process of the Court.

Scarlett, in support of the rule prayed for, contended that such evidence was not admissible without proof that the subscribing witness was domiciled, or settled abroad. The admission of such evidence in any case where the subscribing witness is alive is a modern practice, and a relaxation of the old rule, which required the production of the witness himself to whom the parties had mutually agreed to refer for such proof. And there is good reason for such strictness, as material circumstances may arise out of his examination *vivâ voce*, which cannot otherwise be shewn. In all the cases in which evidence of the hand-writing has hitherto been received, the witness was either proved to be dead, or to have become incompetent, or to be actually domiciled, or settled abroad, and therefore not likely to return within reach of the process of the Court; but in no case has such secondary evidence been admitted where the absence was only temporary, which is the fair presumption arising from the evidence given in this case. [*Le Blanc*, J. That fact was left quite indifferent upon the evidence.] The *onus probandi*, that the subscribing witness was domiciled abroad, lay upon the plaintiff before the secondary evidence could be received. By the stat. 26 *Geo. 3. c. 57. s. 38.* for facilitating the proof of deeds executed in *India* in the courts of *Great-Britain*, and vice versâ, the Legislature have expressly required that the party offering the deed in evidence shall prove that the subscribing witness, whose hand-writing is to be proved, is resident in the other country, before such proof is admitted. In *Barnes v. Trompowsky* (a), Lord *Kenyon* confined the admission of this secondary evidence to cases where the subscribing witness *resides* abroad, &c. and said there was neither necessity nor convenience in relaxing the rule further than had been already done. In *Wallis v. Delancey* there cited, the instrument was executed abroad. So it was in *Adam v. Kerr* (b); and in another case (c) before Lord *Kenyon*, the witness, whose hand-writing was allowed to be proved, was domiciled in *France*. And there is good reason for not relaxing further the strict rule; as otherwise advantage may be taken of the temporary absence of a subscribing witness to sue upon instruments which would be shewn to be void and illegal if the witness were examined in person.

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(a) 7 *Term Rep.* 266.(b) 1 *Bos. & Pull.* 360.(c) *Peake's N. P.* 99.

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Mingay and *Lawes* shewed cause against the rule in the first instance; and relied on the rule laid down by *Buller, J.* in *Adam v. Kerr*, that where the subscribing witness was beyond the reach of the process of the Court at the time of the trial, the evidence of his hand-writing should be admitted. The fact of his intending to return to this country or not (which can only be known to himself), cannot furnish any rule to go by, and must often be matter impossible for the plaintiff to give evidence of. But the presumption in the present case is, that he will not return.

The Court refused the rule; considering that as the witness was out of the jurisdiction of the Court, so as not to be amenable to its process, the secondary evidence was properly admitted.

END OF HILARY TERM.

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ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

In the Forty-second Year of the Reign of GEORGE III.

1802.

IN the course of the last vacation the Right Honourable *Lloyd Lord Kenyon*, Lord Chief Justice of this Court, died at *Bath*, having presided in the Court since *June*, 1788. He was succeeded by

Sir *Edward Law*, Knight, His Majesty's Attorney-General, who was created a Peer of the United Kingdom of *Great Britain* and *Ireland*, by the title of Lord *Ellenborough*, Baron of *Ellenborough*, in the County of *Cumberland*, and was afterwards sworn of His Majesty's Most Honourable Privy Council. His Lordship having been before called to the degree of Serjeant at Law (*a*), and sworn into his office before the Lord High Chancellor on the 12th of *April*, took his seat on the Bench on the first day of this Term. The motto on his rings was, "*Positis mitescunt secula bellis*."

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The Honourable *Spencer Perceval*, Solicitor-General to his Majesty, succeeded to the office of Attorney-General. And

Thomas Manners Sutton, Esq. Chief Justice of the *North Wales* Circuit, and Solicitor-General to his Royal Highness

(a) The stat. 39 Geo. 3. c. 113. enables his Majesty to issue a writ for this purpose in vacation.

1802.

the Prince of *Wales*, was appointed Solicitor-General to his Majesty.

The Honourable *Thomas Erskine* was appointed Chancellor to his Royal Highness the Prince of *Wales*; being the first appointment to that office which had been made by his present Royal Highness.

William Adam, Esq. one of his Majesty's Counsel, learned in the Law, succeeded *Thomas Manners Sutton*, Esq. as Solicitor-General to his Royal Highness.

Friday,
May 7th.

SAUNDERS *against* SAUNDERS and Another.

Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into the next port, on suspicion of smuggling; and after process in the Exchequer, the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant, the owner cannot maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery.

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IN trover for certain goods, tried before *Le Blanc*, J. at the last assizes at *Launceston*, it appeared that the goods, consisting principally of spirituous liquors in ankers, were on board a vessel which was met with at sea (14 leagues off shore) and detained by the defendants, the commander and master of one of his Majesty's hired armed vessels, and afterwards brought into the port of *Fowey*, on suspicion of being intended to be smuggled. The original seizure was on the 28th of *March*, 1800, and a claim was afterwards entered in the Court of Exchequer for the vessel and cargo; in which, after some proceedings had, a writ of delivery was granted at the prayer of the owner (the present * plaintiff) which was executed on the 5th of *December*, 1800. The present action was brought, in order to recover the value of certain part of the goods alleged to be wanting of the whole quantity seized by the defendants: and the declaration being entitled of *Hilary Term* 1801, it was objected at the trial on the part of the defendants, that the action commenced too late, as by the st. 28 *Geo. 3. c. 37. s. 23.* it ought to have been brought within three months from the time of the original seizure (*a*). And by stat. 26 *Geo. 3. c. 40.*

(*a*) That sect. enacts, "That if any action or suit shall be brought or commenced against any person or persons for any thing by him or them done in pursuance of this or any other Act or Acts of Parliament now in force, or hereafter to be made, relating to his Majesty's revenues of Customs and Excise, or either of them, such action or suit shall be commenced *within three months next after the matter or thing done,*" &c.

s. 27, the commanders of any of his Majesty's ships of war, or any commissioned, warrant, or petty officer specially authorized by them, may seize any goods or vessels whatever, subject to forfeiture by that or any other Act, for any offence against the revenue, &c. without having any deputation or commission from the commissioners of the customs or excise for that purpose, provided they bring the seizure to the nearest custom-house, &c. And the case of *Godin v. Ferris (a)* was relied on, to shew that the action must be commenced within three months after the actual seizure, notwithstanding the pendency of process in the Exchequer. The plaintiff was accordingly nonsuited. And now,

Lens, Serjt. moved to set aside the nonsuit, on two grounds :
 1. That although the words of the 23d section of the st. 28 *Geo. 3. c. 37*, were general, as extending to "*any person*," &c. yet they must be confined to persons having some colour of authority from some court or officers of revenue to do the act complained of; which did not plainly appear here. 2. That this was distinguishable from the case of *Godin v. Ferris*, which was an action of trespass, complaining of the original wrongful act; whereas this was an action of trover, in which only the value of those goods was sought to be recovered, which had not been restored to the plaintiff pursuant to the order of the Court of Exchequer, admitting the original seizure to have been justifiable.

The Court, however, overruled both the objections to the nonsuit. For, as to the first, the stat. 26 *Geo. 3. c. 40. s. 27*, gave the defendants a colour of authority for the seizure, supposing that were necessary under the general provision of the stat. 28 *Geo. 3.* And, secondly, There was no distinguishing an action of trover from an action of trespass in this view; as in each the legality of the original seizure might be brought into question; and therefore the case of *Godin v. Ferris* was in point that the action must be commenced within three months from that period.

Rule refused.

(a) 2 H. Blac. 14.

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 against
 SAUNDERS
 and
 Another.

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1802.

Saturday,
May 8th.

DOE, on the Demise of WHATLEY, against TELLING.

A conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace (in whom it is vested upon the order for the insolvent's discharge by the stat. 41 Geo. 3. c. 70. s. 15. until the subsequent conveyance to the creditor) does not vest the estate in such creditor by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace. Therefore such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent debtor, and the order was made to convey the same to the lessor.

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THE defendant was an insolvent debtor, who was discharged under the last Insolvent Debtors' Act (41 Geo. 3. c. 70.) on the 4th of *August*, 1801: having previously, as required by that Act, delivered in a schedule of his estate and effects, containing a small freehold estate in the county of *Wills*.

The 15th section of the Act enacts, "That all the estate, right, title, interest, and trust of such debtor in and unto all the real estate, &c. shall *immediately after* such adjudication (*i. e.* that the debtor is entitled to the benefit of the Act, &c.) be, and the same is hereby *vested in the clerk of the peace* of the county, &c.; and every such clerk of the peace, &c. is hereby directed and required *to make an assignment and conveyance* of every such debtor's estate and effects, *vested in such clerk of the peace, &c. as aforesaid* to such creditor or creditors of the said debtor as the justices at any general or quarter sessions of the peace, &c. shall order and direct, &c. which assignment and conveyance shall be good and effectual in the law to all intents and purposes whatsoever, &c. *to vest the estates thereby assigned and conveyed* in the party or parties to whom the same shall be so assigned and conveyed, his heirs," &c.

The order to assign and convey the estate in question to the lessor of the plaintiff was made by the justices on the said 4th of *August* last, and the conveyance to him by the clerk of the peace of the county of *Wills* accordingly* bore date on that day; but in fact it was not executed until the 6th of *September*, and the demise was laid on the 2d of the same month. Under these circumstances *Le Blanc*, J. nonsuited the plaintiff at the trial at the last assizes at *Salisbury*, considering that his title did not accrue till after the day of the demise laid.

Gibbs now moved to set aside the nonsuit, suggesting, that though the statute vested the insolvent debtor's estate in the clerk of the peace in the first instance, and until an assignment and conveyance were made by him to some creditor under the direction of the justices,—yet after such order, and the execution of the assignment accordingly by the clerk of the peace

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the creditor was in by relation to the time of the discharge, when the estate was out of the insolvent debtor; by analogy to the statutes of bankrupt, where after an actual assignment the assignees of the bankrupt were in by relation to the act of bankruptcy, when the bankrupt's estate was divested by the act of the law.

The Court, however, thought the nonsuit proper; the Act of Parliament having positively vested the insolvent debtor's estate in the clerk of the peace until his subsequent assignment and conveyance of it to the creditor, pursuant to the order of the justices. And they observed, that if another demise by the clerk of the peace had been laid, it would have obviated any inconvenience which could have arisen in this case from the lessors want of knowledge when the assignment was actually executed.

Rule refused.

STEPHENS *against* CRICHTON.

ERSKINE moved that the Master might review his taxation of costs in this case, he not having allowed the defendant the expences of taking interrogatories of his own witnesses, and the office copies of the depositions of the plaintiff's witnesses taken before commissioners abroad. The action was brought to recover damages on account of the defendant's ship having run down the plaintiff's: and after notice of trial given and countermanded, it was agreed that as several of the witnesses on either side were going abroad, they should respectively be examined upon interrogatories, and that the depositions of others of the plaintiff's witnesses, who were then abroad, should be taken before the commissioners there. The plaintiff at the trial read many of the depositions made by his own witnesses: but made so weak a case, that it became unnecessary for the defendant to read his depositions in answer (but which were now sworn to be material to the merits of the case); and a verdict passed for the defendant. It was now insisted that the defendant was entitled to be allowed the costs in question as much as in the case where a party subpœnas material witnesses who attend at the trial, but are not examined on ac-

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The party succeeding is not entitled to the costs of examining witnesses or interrogatories, or taking office copies of depositions: but each party applying pays his own expence, unless it be otherwise expressed in the rule.

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count of the failure of the plaintiff's case, or to save the time of the Court.

The Court, however, on consulting the Master, said that the practice had been against the allowance of costs to the party succeeding in such cases. They referred to an anonymous case in *E. 24 Geo. 3. (Hullock on Costs, 437.)* where the rule was laid down that the costs of examining witnesses upon interrogatories were always borne by the party obtaining the rule for such examination, and did not abide the event of the cause unless so ordered by the Court. Lord *Ellenborough* observed, that however desirable it was that the taxed costs should really indemnify the party who was ultimately found to be in the right,—yet it was necessary to keep a check upon the very great expence to which this might lead, and to incur which the interest of unconscientious agents might afford a temptation. That there was the less reason to break in upon the rule in this case, as the examination of witnesses on interrogatories in any case, was a matter of indulgence and consent.

Rule refused.

Friday,
May 14th.

COLLETT and Another against Lord KEITH.

In justifying a trespass under the process of a foreign Court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior Courts; but at any rate a plea which only states that the Court abroad was governed by

TO an action of trespass *vi et armis*, for seizing and taking the ship and goods of the plaintiffs at the *Cape of Good Hope*, to wit, &c. and converting the same to the defendant's use; the defendant, amongst other pleas, pleaded by way of justification, that a little before the said time when, &c. the said settlement of the *Cape of Good Hope* being a foreign, to wit, a *Dutch* settlement, was conquered and taken by the King in open and lawful war from certain enemies of the King, and by virtue of that conquest from thenceforth until and at the said time* when, &c. remained and was in the lawful possession of the King; and that the same settlement, not having received laws from his Majesty or from any other lawful authority since

foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such Court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said Court, having competent authority in that behalf, to seize the property, is bad, being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the Court, or party to the cause; or of what nature the charge was, or by whom instituted, or what the order of the seizure was, whether absolute or *quousque*, &c.

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the said conquest, the former laws and customs, Courts and jurisdictions of the said settlement being foreign, viz. *Dutch* laws and customs, Courts and jurisdictions, from the time of the same conquest until at the said time when, &c. remained and were in full force in and throughout the said settlement for the regulation and government of the same, to wit, at, &c. And the said settlement, so being in the lawful possession of the King, and the same laws and customs, Courts and jurisdictions, so being in full force as aforesaid, the said ship with the said goods, &c. on board thereof a little before and also at the said time when, &c. was at a certain place called *Simon's Bay*, part of the said settlement, and within the jurisdiction of the Supreme Court of judicature there, to wit, &c. the same Court then and there being a foreign, to wit, a *Dutch* Court, then and there lawfully subsisting, and governed by the same foreign laws and customs, and lawfully administering the same laws and customs in the said settlement for the regulation and government of the same, to wit, &c. And the said ship and goods, &c. so being within the jurisdiction of the same Court a little before the said time when, &c. certain legal proceedings according to the same foreign laws and customs had been and were instituted, and until, at, and after the said time when, &c. continued and were depending in the same Court against the said ship and goods, &c. the same Court having lawful and competent jurisdiction and authority in that behalf, to wit, at, &c. and such proceedings were thereupon had in the same Court, that the defendant afterwards and a little before the said time when, &c. to wit, on, &c. was according to the said foreign laws and customs, empowered and authorized and ordered by the same Court, having lawful and competent jurisdiction and authority in that behalf, to seize and take the said ship and goods, &c. being within the jurisdiction of the same Court, and to detain the same under the authority of the same Court, to wit, at, &c. By reason whereof, &c.

To this plea there was a demurrer, and the following special causes were assigned, viz. That it does not appear by the said plea when or what legal proceedings had been, or were instituted, or depending in the Supreme Court of judicature, in the said settlement, against the said ship and goods, &c. nor for what cause the same had been or were instituted; and also, for that it does not therein appear nor is alleged on what account

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count or by reason of what facts the said Court ordered or had power to order the seizure or detention of the said ship and goods, &c. ; nor by what law or custom, or by what proceedings, or how, or in what manner the defendant was empowered, authorized, or ordered by the said Court to seize and take the said ship and goods, &c. : and also, for that it is not thereby alleged that any or what order, authority, process, decree, judgment, or sentence was made, issued, or pronounced by the said Court respecting the said ship or goods, &c. or respecting the detention thereof : and also for that no certain or material issue can be taken upon the said plea, &c.

This case was argued in *Michaelmas* Term last by *Giles* in support of the demurrer, and *Jervis* contra ; and in this Term by *Gibbs* for the demurrer, and *Park* contra.

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In support of the demurrer, it was urged that there was no precedent in the books of a justification so general as this, nor any direct authority to warrant such a justification under the order of a foreign Court ; but that by analogy to justifications for similar acts done by virtue of process out of the Courts in *England*, the plea was clearly bad. It is a general rule of pleading, that where a party justifies a trespass under an authority given, he must shew that authority. *Co. Litt.* 283. *a.* There is a difference however in this respect between the party to the cause, and the officer who executes the process of the Court : the former must shew the judgment as well as the writ ; but the latter need only shew the writ under which he acts ; because he is bound at any rate to obey it within the jurisdiction of the Court by which it is issued. Yet where the officer justifies together with the party, he is holden to the same strictness in pleading. These rules govern even where the justification is founded on process out of the superior Courts at *Westminster*. *Cotes v. Michael* (*a*), *Tarlton v. Fisher* (*b*), *Philips v. Biron* (*c*), *Mathews v. Carey* (*d*), and *Lamb v. Mills* (*e*), are in point. But in justifying process out of inferior Courts here, the party is holden to still greater strictness. Formerly indeed, it was necessary for him to set forth all the proceedings ; but though that rule has been relaxed, still he must shew that the inferior Court had jurisdiction of the subject-matter ; that the cause of

(*a*) 3 *Len.* 20.

(*d*) 3 *Mod.* 137.

(*b*) *Dougl.* 671.

(*e*) 4 *Mod.* 573.

(*c*) 1 *Str.* 509.

action arose within the jurisdiction: that a plaint was regularly levied, and (in case of judicial process) that judgment was thereupon obtained, and that the writ or process issued to the proper officer, who thereupon executed the same. The officer indeed need not shew that the cause of action arose within the jurisdiction of the Court, though he must set forth such jurisdiction; because that in the case of inferior Courts is a fact of which the Judges are not bound to take cognizance: he must also shew that such a plaint was levied of which the inferior Court had jurisdiction, and that such proceedings were had &c.; that certain process issued directed to him as an officer of the Court, which was delivered to him to execute, and that he did accordingly execute the same. *Gwyn v. Poole (a)*, *Moravia v. Sloper (b)*, *Morse v. James (c)*, and *Rowland v. Lealè (d)*. In no case is it sufficient either for the officer or the party to plead generally that he committed the trespass complained of by order of such a Court; for he might as well justify it by saying that he did it according to the law of the land. The proceedings of the King's Courts in the Colonies (to which this case bears the greatest analogy), cannot in reason be considered as entitled to higher credit than the proceedings of the Courts here. They can at most only be put on the same footing with our inferior Courts; and those who claim or justify under them, must at least be holden to as strict rules in pleading as apply to justifications under the process of such Courts. This is evident from considering the principle on which all the authorities on this subject proceed. The reason why a defendant may justify more generally under the process of a superior than of an inferior Court is, because the Judges are in the first instance presumed to know the extent of the jurisdiction: and therefore it is not necessary to allege that the superior Court had jurisdiction of the subject-matter, or that the cause of action arose within such jurisdiction: both which are necessary to be alleged in the case of inferior Courts; because the Court are not presumed to be cognizant of the facts till brought before them by proper averments. This necessity therefore cannot be less in regard to justifications under the process of foreign Courts, of which the Judges here must be taken to be wholly ignorant till disclosed to them by pleading. Suppose

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(a) *Lutw.* 935. 1560.

(b) *Willes*, 80.

(c) *Ibid.* 122.

(d) *Corp.* 18.

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the ship had been taken in execution by the Sheriff, under a writ of *fieri facias*, and this action of trespass brought against him; though he would only state in his justification that the plaintiff in the former action sued out a writ of *fieri facias* under a judgment before that time recovered in a certain action against a former defendant, which writ was directed to him as Sheriff, whereby he was commanded, &c. and that it was delivered to him to be executed, and that he did execute it accordingly by taking the goods. &c. yet, in addition to those facts, their previous knowledge of the law, which the law itself presumes them to have, enables the Judges to know that the writ issued in a civil proceeding; such whereof the Court had cognizance; that the writ of *fieri facias* was the proper process in such a suit; and that the sheriff was the proper officer to whom it ought to be directed, and by whom it should be executed: upon the whole, therefore, they would have sufficient assurance that the proceeding itself, so far as regarded the Sheriff, was regular, and that the process itself was properly executed. But wherever the jurisdiction is unknown to the Court, all those matters which they are in the other case presumed to know, and which are necessary to constitute the entire justification of the party, must be supplied by adequate averments: there is therefore an additional necessity imposed on the party, namely, to state the law by which such proceedings are justified, as well as the proceedings themselves; for the law of a foreign country is no more than a fact here, which must be averred and cannot be presumed. Then, as it must be admitted that a justification so general as the present would not suffice to protect a Sheriff acting under the process of one of the superior Courts, *a fortiori*, it cannot protect the defendant acting under a jurisdiction wholly unknown to the law. Here the description of the Court itself is uncertain, as to its nature and general jurisdiction. The plea states, "that certain legal proceedings had been instituted," &c. but it does not state what those proceedings were, whether criminal or civil, or by whom instituted, or on what account. It states no previous complaint or charge; but that such proceedings were thereupon had: so that it does not appear upon what such proceedings were had. It is said that all this was done according to the foreign laws and customs; but it does not shew what those laws and customs were. It states that the defendant was empowered,

empowered, authorized, and ordered to seize the ship, &c.; but it does not set forth the order by which he was so authorized. It is not even averred that he was the person to whom such order was directed, or that he was bound to obey it. It cannot be collected whether this were mesne or judicial process; nor for how long he was to seize or detain the ship; nor for what purpose. All these matters would have been necessary to be shewn in analogy to cases of inferior jurisdiction here, even if it had distinctly appeared that the defendant was an officer of the foreign Court, and bound to execute its process: but nothing of that sort appears; and therefore he stands in the same situation as a party at whose instigation the proceedings were had; in which case it is not only necessary to state the writ authorizing the seizure, but also the judgment on which it is founded.

For the defendant it was insisted, that there was no analogy between Courts of inferior jurisdiction here and foreign Courts; and that the reasons on which the cases had proceeded in respect of the former, did not apply to the latter. The defendant justifies under the orders of a Court in a foreign settlement averred to be governed by *Dutch* laws, though at that time in the possession of the King as a conquest; which according to *Calvin's* case (*a*), and *Blankard v. Galdy* (*b*), is consonant to the law of *England* in the case of a new conquest till our own laws are there promulgated by the King. The plea further states, that the property seized was within the jurisdiction of the Supreme Court of judicature there; and that the defendant was by the order of that Court, which is averred to have had competent jurisdiction in that behalf, empowered and ordered to seize and detain it. This is the substance and sense of all justifications of this kind under our municipal Courts: and it would have been useless and nugatory to have gone further and to have set out what those foreign laws were, and what the process of the Court was: because, be they what they might, this Court could not tell whether the proceedings had been regular or not, having no previous knowledge of the foreign law wherewith to compare them: nor could it sit as a Court of review upon the justice or legality of the decision of a foreign independent judicature. It has been always holden, that the judgment of a foreign Court of competent jurisdiction, is conclusive upon the subject-matter of the adjudication, and that

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(*a*) 7 Co. 17, b.(*b*) Salk. 111.

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(a) 2 *Show.* 232. (b) *M.* 13 *G.* 1. cited in *Rep. temp. Hardw.* 87. 12 *Vin.* Abr. 87. pl. 9. and 2 *Str.* 733. *S. C.* (c) *Rep. temp. Hardw.* 87. (d) *B. R. E.* 29 *Geo.* 3. *Dougl.* 5. b. n. 2. (e) 2 *H. Blac.* 410. per *Eyre, C. J.* (f) 7 *Term Rep.* 681. (g) Cited in the *Duchess of Kingston's case*, 11 *St. Tr.* 202.

2 *Roll. Abr.* 558. C. *pl.* 2.; and every thing is to be presumed in favour of the regularity of the proceeding of a foreign Court, unless the contrary appear. The same presumption is made even in the case of inferior Courts at home, provided the jurisdiction sufficiently appear. *Sellers v. Lawrence (a)*, and *Moravia v. Sloper (b)*. So in *Ladbroke v. James (c)*, it was holden sufficient, after stating facts which gave a limited Court jurisdiction, to allege generally that the Court gave such a judgment. *Willes, C. J.* there said, that if it had appeared that the Sessions had jurisdiction to discharge the insolvent debtor, it would have been sufficient to have said generally that the Sessions had discharged him; and that the Court above could not inquire into any facts necessary to be done by him in order to obtain his discharge; of which the Sessions were the only and the proper judges. In *Otto v. Selwin (d)*, the Admiralty Court warrant, under which the defendant justified the trespass, merely recited that a case was depending therein *de re maritimâ*, and commanded the defendant their officer to take the plaintiff; which was holden sufficient, without shewing the particular matter. In all cases the officer is more favoured in pleading than the party, and need only shew the writ or warrant without shewing the judgment (*e*); because the officer, who acts only ministerially, is at all events bound to obey the process; and the Court, from their knowledge of such process, are enabled to see whether it were such as by the law he was bound to obey; whereas in this instance the view of the process can afford no information to the Court as to its legality; and therefore it would have been nugatory to have set it out. Upon this principle, where a party had seized and condemned goods in *Iceland* under the dominion of the King of *Denmark*, by a grant from that prince, and under their law, and afterwards coming into *England* was sued for such acts by the former owner of the goods, Lord Nottingham, in *Badtolph v. Bamfield (f)*, granted a perpetual injunction, saying, that what was done there was according to their law: and that it was not properly triable here whether the King of *Denmark* had power to make such a grant. So here it is not properly triable whether the Supreme Court of judicature at the Cape had power to make such an order to the defendant; but the only material question is,

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(a) *Willes*, 412. (b) *Ibid.* 54. (c) *Ibid.* 199—201. (d) 2 *Lev.* 131.

(e) *Cotes v. Mickill*, 3 *Lev.* 10. *Britton v. Cole*, 1 *Salk.* 192. and 5 *Com. Dig.* 322. tit. *Pleader*, 3 *M.* 24. (f) *Finch's R.* 136.

whether they

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whether in fact such an order were made? which is sufficiently stated for the plaintiff to put in issue by the common replication *de injuriâ*, &c. This case then falls within the scope of those authorities where it is sufficient, even in the case of an inferior jurisdiction, to plead *taliter processum est*: as in *Gwynne v. Poole* (a), *Truscott v. Carpenter* (b), *Johnson v. Warner* (c), *Titley v. Foxall* (d), and *Adams v. Freeman* (e). Here it answers every reasonable purpose to aver generally that the foreign Court had jurisdiction to do the act which they ordered to be done: and no hardship is hereby cast on the plaintiff; because it is a matter *in pais*, and the affirmative of the proof lies on the defendant pleading it. The reason why such matters must be pleaded specially when arising here, is from a technical distinction between matters of record and matters not of record, the former of which must always be pleaded with a *prout patet*, &c.; but no such distinction prevailing in respect to judicial proceedings abroad, the same necessity does not exist; and *non constat* but that all the proceedings in this case were *ore tenus*.

In reply it was said, that the whole of the defendant's argument turned on the assumption that he was an officer of the Court; which did not appear: and it was admitted that the party who put the proceedings of any Court in motion (which, for aught appeared to the contrary, was done by the defendant himself), was bound to shew that they were regular. That the question was not, how far the sentences of a foreign Court were conclusive, but how they were to be shewn in pleading. That the plaintiff could not dispute the judgment of the foreign Court, because the defendant had not shewn what it was. That the rule, requiring this to be set out by the party, was not merely for the information of the Court, but also to enable the other party to meet the charge. That admitting the proceedings might be pleaded generally, the objection held that they were not set out at all: so that the plaintiff could not even tell the nature of the charge. That this applied as well, whether the proceedings were *ore tenus* or in writing; and in the case in 2 *Rot. Abr.* 558, the order, though made *ore tenus*, was set out. That all the cases proved, that where it was necessary to shew a jurisdiction in the Court, as in the case of inferior Courts, it was not enough to aver such jurisdiction generally, but such

(a) 2 *Lutw.* 937.

(b) 1 *Ld. Raym.* 230.

(c) *Wilks*, 523.

(d) *Ibid.* 638.

(e) 2 *Wils.* 5.

facts must be stated as shewed that the case was within it. That the defendant could not be prepared to prove the legality of the seizure unless he were cognizant of the facts; and therefore there was no more hardship in requiring him to plead them in this than in other cases.

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GROSE, J. (a) The defendant justifies the trespass complained of as having been done under the authority and by the order of the Supreme Court of Judicature at the *Cape of Good Hope*. In pleading such justifications, the law makes a difference between the party claiming the aid of such Court, and the officer of the Court who is bound to obey its orders, in favour of the latter. In the present case therefore, it would be most for the advantage of the defendant to consider him as such officer; for as party, there is not the smallest pretence to say, that the plea will justify him. But considering him to have acted as officer, it was incumbent on him to have shewn that by his plea; and that he acted under a Court of competent jurisdiction; that such an order issued to him; and that he has not transgressed it in doing what he has done. Then trying the validity of this plea by those rules, it cannot be supported; for though in one part the defendant affects to consider himself as an officer of the Court abroad, by stating that he was *ordered* by that Court to do the act complained of, yet that does not shew that he was the officer of the Court; but he should have averred that he was so, and have shewn that the order applied to him as such. For this purpose he should have stated what the order was; that the Court might see that he was bound to obey it, and that he had not transgressed his authority in what he did. But nothing of that sort appears; and if the parties were to go to issue on this plea, I do not see what the plaintiff is to be prepared to answer. The plea is abundantly too general, and answers none of the purposes for which such a plea was intended. I am aware of the inconvenience to a defendant in such a case, in holding him to greater strictness in pleading; but that cannot alter the law, though perhaps the difficulty which has occurred may suggest the propriety of some legislative provision on similar occasions. It is our province only to decide, whether this be a good justification in point of law according to the rules which have governed in similar cases; and if it be not, we must

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(a) Lord *Ellenborough*, having been concerned as counsel in the cause, declined giving any opinion.

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give judgment for the plaintiff. As to what has been urged respecting the jurisdiction of the Court, I observe that it is stated; that the ship and cargo were within the jurisdiction of the Court which was governed by foreign laws: and that certain legal proceedings according to such laws, were instituted and depending in the Court against the ship and cargo, the Court having competent jurisdiction in that behalf, &c. But the defendant ought to have shewn what the foreign law was which gave jurisdiction to the Court abroad in this respect: for that is a fact; and that the subject-matter was within the jurisdiction; and how it became amenable to the process of the Court. But however this may be, the defendant, at any rate, might have shewn more fully how he was authorized to act in the manner he has done; and I am clearly of opinion, that the justification pleaded is too general.

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LAWRENCE J. I agree in opinion that this plea is bad: in saying which I confine myself merely to the generality of it; in consequence of which the plaintiff cannot be prepared to answer it. How far the law is to be carried in favour of the officers of Courts in this or any other country, or how far it is necessary to state facts which shew that the proceedings were within the jurisdiction of the several Courts, are questions which I shall not at present particularly enter into. There may perhaps be a distinction, as contended for, between justifications pleaded under the process of foreign Courts, and such justifications under our own Courts; and it may be sufficient in the former case to allege more generally the subject-matter, and that the parties were within the jurisdiction, than in justifying under the process of inferior Courts in this country; in which case it is necessary not merely to allege generally that they had jurisdiction over the subject-matter, but to state what the jurisdiction was, and then allege such facts as may enable the superior Court to judge whether the Court below had jurisdiction of the cause or not. However, I give no opinion on these points; because at all events this plea is so general, that it is impossible for the plaintiff to guess what the defendant means to rely on at the trial. It does not state what the charge was, or who were the parties to it, or at whose instance the order was given, or at what time, or for what object. It is not necessary however for me to say how far such a plea should go: it is enough to say that this is too general.

LE BLANC, J. The principal object of putting a justification

of this sort on the record, is to give the other party notice of what he is to answer: and where no case has been decided, or rules laid down with respect to such justifications under foreign jurisdictions, we can only reason from analogy to the precedents of our own Courts. How far it may be necessary to pursue that analogy it is not now necessary to state, because this plea at all events falls very short of those precedents. It is not sufficient barely to state that the ship and cargo were within the jurisdiction of the foreign Court, where it is not stated what the cause of complaint was, or whether it were a criminal or civil proceeding which was instituted, or by whom the charge was preferred. It is only stated, that certain legal proceedings had been and were instituted; of what nature does not appear; nor is any judgment or decision of the Court stated thereupon. The plaintiff cannot tell whether these proceedings were instituted against the ship for any offence committed by any of the persons on board, which subjected her to forfeiture; or whether it were a civil complaint to recover damages, to which the ship was liable. Even supposing Lord *Keith* to have been an officer of the Court, which is not stated in the plea, at least he should have stated what the order was, by virtue of which he made the seizure; whether it were an order to compel appearance, or to satisfy the party complaining in execution; whether it were for an absolute seizure, or merely *quousque*, until such an act done: for then the plaintiff might have replied that he had appeared, or had done the thing required, or had satisfied the damages to the party; and then have new assigned a subsequent trespass. All this was necessary to be stated, because the merits of the case might ultimately turn upon it; but nothing of the sort is shewn; and therefore I am clear that there ought to be

Judgment for the Plaintiff.

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The KING *against* the Inhabitants of SOWERBY.

Saturday,
May 15th.

TWO justices by an order removed *R. Murdock* and his children by name from the parish of *St. Mary*, in the town and liberties of *Beverley* in the East Riding, to the township of *Sowerby* in the North Riding of the county of *York*. The Sessions man continuing to reside in the certificated parish with his mother after the father's death, as part of her family, though the son were of age, and carrying on business for himself; such circumstances not amounting to an emancipation.

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on appeal confirmed the order, subject to the opinion of this Court, on the following case:

Richard Stokell in 1745 went with a certificate, in which he only was named, from *Darlington* to *Sowerby*; and during his residence there under that certificate, his son *Ralph Stokell* was born. *Richard Stokell* died; after whose death *Ralph* his son, being arrived at manhood, followed the business of a twine-spinner at *Sowerby* for many years; and about 1780, which was ten years after the death of his father, he engaged the pauper *R. Murdock* as his servant in the above business; and the pauper continued in such service at *Sowerby* for eleven years, during which period he was whilst unmarried hired to and served him for a year. *Ralph Stokell* also during these years hired a boy to turn the wheel necessary in twine-spinning. When the pauper was hired for and served a year as above-mentioned, *Ralph Stokell* was a bachelor, and lived in a house at *Sowerby* with his mother, which she went to and rented after her husband's death, at about fifty shillings a-year; and he never left this house or his mother, except for a few weeks in harvest-time, in one year. The mother had no concern in the twine-spinning business; and the pauper and the boy were the servants of *Ralph Stokell*, and not of his mother.

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This case was first argued in the last Term, when the Court, after hearing the counsel in support of the orders, directed them to be quashed, being clearly of opinion that *Ralph Stokell*, the son of the certificated man, continued to reside with his mother in *Sowerby* under the certificate granted to the father and his family, and therefore that the pauper could not gain a settlement by a hiring and service with *Ralph Stokell*. But a doubt being afterwards suggested from the Bar, whether some cases which had not been adverted to before might not vary the consideration of the question, the matter was directed to stand over for further argument.

Holroyd now contended, in support of the orders, that *Ralph Stokell*, the pauper's master, was emancipated at the time of the hiring and service of the pauper; and that if so, the pauper might gain a settlement by hiring and service with him in *Sowerby*, although the certificate remained in force with respect to the widow of the certificated man. The circumstances which emancipated *Ralph Stokell* from his surviving parent were, the being of age and setting up in business for himself, and hiring servants
of

of his own, whereby he became the head of a new family. In *R. v. Walpole, St. Peter's in Norfolk* (a), one who had enlisted as a soldier, and was of age, was holden to be emancipated, though he afterwards returned and lived as part of his father's family. But in *R. v. Halifax* (b), a son under age, who occasionally resorted to his father's house, was deemed to continue part of the father's family, though he had bound himself out apprentice to another, and worked about the country in the way of his business. The circumstance of infancy also formed a principal ingredient in *R. v. Offchurch* (c), where Lord *Kenyon*, C. J. said that ordinarily speaking, one of these things must happen before a son can be said to be emancipated; either he must have obtained a settlement for himself, or have become the head of a family, or at most, he must have arrived at that age, when he may set up in the world for himself. Here two of the circumstances concur. To which, in *R. v. Witton cum Twaubrookes* (d), Lord *Kenyon* added the circumstances of the son's being of age, or marrying. With respect however to the mere circumstance of being of age, his Lordship afterwards, in *R. v. Rouch* (e), corrected what he had before been supposed to say, and said that a son's being of age was not in itself an emancipation, if he continued an unbroken residence in his father's family. But here there are the other concurring circumstances mentioned. Then if the son were emancipated, the stat. 12 *Ann. st. 1. c. 18. s. 2*, will not apply to prevent the pauper's gaining a settlement by the hiring and service; for in *Rex v. Darlington* (f) a certificate was holden not to include grandchildren, and only to extend to the wife and children who continued part of the father's family. Lord *Kenyon*, C. J. said, that when a son became the head of a family, then the words of the stat. 8 & 9 *W. 3. c. 30*, public policy and the convenience of mankind, required that he should no longer be considered as part of his father's family, or be protected by the certificate granted to the latter. And in *Rex v. Heath* (g) it was expressly decided, that the son of a certificated person having married, and living in a house of his own, thereby ceased to be under the protection of the certificate, and might gain a settlement like any other person in the certificated

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(a) *Burr. S. C.* 638.(b) *Burr. S. C.* 806.(c) 3 *Term Rep.* 114.(d) 3 *Term Rep.* 356.(e) 6 *Term Rep.* 252.(f) 4 *Term Rep.* 797—800.(g) 5 *Term Rep.* 583.

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parish. It is true there was a separation in fact there from the father's house; but that cannot make any difference, provided the son were emancipated by the means here stated; for without such emancipation he would still have continued under the certificate, though he had resided in a separate house from his parent (a). The general rule is, that wherever a person ceases to reside under the protection of the Certificate Act, 8 & 9 W. 3. c. 30, the stat. of *Anne* no longer applies to him.

Wood contra. This case turns on the construction of the stat. 12 *Ann. st.* 1. c. 18. s. 2, which enacts, that no person bound as an apprentice or hired as a servant to any person "who shall come into or reside in any parish by means or licence of a certificate," shall thereby gain a settlement. The question then is, whether *Ralph Stokell*, the son of the certificated person and the master of the pauper, was not residing in *Sowerby* at the time of the hiring and service, "by means or licence of the certificate" granted to his father? It has been holden, that a child born after a man comes into the certificated parish, is within the certificate (b); and that he so continues after his father's death (c). Also in *R. v. Hampton* (d) the certificate was determined to extend to a second wife married after the granting of it; and what is immediately in point, that an apprentice bound to such wife after the husband's death could not gain a settlement thereby in the certificated parish, though the second wife were not named in the certificate, as she continued to reside under the certificate. It is clear then from these authorities, that both the mother and the son continued to reside under the certificate after the father's death: and these were not broken in upon by *R. v. Darlington* (e); for that only decided that the certificate did not include grandchildren. Then the only case which at all bears upon the present, is *Rex v. Heath* (f); but that went on this plain distinction, that during the father's lifetime, who alone was named in the certificate, the son married, and was separated in fact from the father's family, and became the head of a distinct family and house of his own. He therefore ceased to come

(a) *Vide R. v. Bath Easton*, 8 Term Rep. 446.

(b) *Sherborne v. Thorneford*, Burr. S. C. 132.

(c) *R. v. Alfrington*, 7 Term Rep. 471.

(d) 5 Term Rep. 266.

(e) 4 Term Rep. 797.

(f) 5 Term Rep. 583.

under the description of the father's family; and might gain a settlement for himself. Whereas here there was no actual separation of the son from the mother's family; and as she certainly continued to reside under the certificate, it must also extend to all those who continued members of her family. The certificated parish could have no notice that he ceased to be part of her family, either from the circumstance of his coming of age, or his carrying on business for himself, which he might do before he was of age, or from his hiring the pauper.

Lord ELLENBOROUGH, C. J. The opinion which I have formed does not appear to me to clash with the case of *The King v. Heath*. There, there was every thing which could well be predicated of emancipation: the marriage of the son; his living in a separate house from his father, as the head of a distinct family; and being rated by the parish as such in his own name. Here there is nothing of the kind; while the father was living, the son resided under his roof: and after the father's death he continued to reside with his mother, who was the representative of the father, and equally protected by the certificate. This comes then directly within the principle of *The King v. Hampton*; where it was holden, that an apprentice to the widow of a certificated man, could not gain a settlement in the certificated parish after the husband's death. If this question had come now to be decided for the first time, I should have been prepared to decide it on the plain words of the stat. of *Anne*, referring to the stat. 8 & 9 W. 3. c. 30. and 9 & 10 W. 3. c. 11, which have been broken in upon by many cases, laying down rules of construction much less plain than the words of the statute itself. The stat. 9 and 10 W. 3. c. 11, speaks of two methods only by which any person coming into a parish with a certificate shall by any Act whatsoever be adjudged to have procured a legal settlement there: those are, by taking a tenement of the yearly value of 10*l.* or by executing some annual office within the parish. Then the stat. 12 Ann. st. 1. c. 18. s. 2, enacts, that "if any person shall be an apprentice bound " by indenture, or be a hired servant to any person who *came* " into (which extends to such as came into the parish with the " person certificated) or *shall reside* in any parish by means or " licence of such certificate" (which includes such persons as come into the parish afterwards, and reside under the protection of the certificate) " and not having afterwards gained a

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“legal settlement there” (which was in allusion to the methods pointed out by the stat. 9 & 10 *W. 3. c. 11.*), “such apprentice or servant shall not be adjudged thereby to have a settlement in such place,” &c. The object of the Legislature by these Acts certainly was to protect the certificated parish from sustaining any new burthen by persons gaining settlements there, who were residing there upon the faith of these certificates, except by one or other of the methods pointed out. I am therefore decidedly against extending the construction of the statutes further than it has been carried. Now, who can be considered as a person residing by means or licence of a certificate, if the son of a certificated man, continuing to live with his father’s widow in the certificated parish, is not such a person? If, as in the *Hampton* case, the widow of a certificated man were privileged to continue in the parish under the certificate after his death, as part of his family, so must his son by the same rule, who continued part of the same family. There was no emancipation in this case to distinguish it from the other; but it comes expressly within the principle of the *Hampton* case; and, what is more material, it comes directly within the meaning of the statute of *Anne*.

GROSE. J. A person is within the words of the statute of *Anne*, who is serving another residing in any parish by means or licence of a certificate. Now here *Ralph Stokell*, the son, either lived there as part of his father’s or his mother’s family during all the time: and it is not denied, that both the father in his lifetime, and the mother after his death, were residing in *Sowerby* under the certificate. There was no emancipation of the son, no taking of another house for himself, nor any thing of the sort which occurred in *Rex v. Heath*; and there is no pretence for saying, that his going out for a few weeks at harvest-time would operate as an emancipation. We ought to be careful not to create more doubts, by refining away the meaning of the statute and prior decisions upon the subject.

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LAWRENCE, J. declared himself of the same opinion.

LE BLANC, J. We are now called upon to put a construction upon the statute 12 *Anne*; and as in the only case which turned on that branch of the statute, *The King v. Hampton*, it was holden that the widow after the husband’s death was still protected by the certificate as part of his family, and therefore

that

that her apprentice serving her could not thereby gain a settlement in the certificated parish; so neither can the servant to the son continuing part of the same family gain a settlement there,

Both Orders quashed.

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Lord RODNEY and the Honourable JOHN RODNEY
against CHAMBERS,

Tuesday,
May 18th.

IN covenant, the plaintiff declared, for that whereas by indenture of the 18th August 1798, made between *George Chambers* (the defendant) of the first part, the Honourable *Jane Chambers* his wife of the second part, *George Lord Rodney* and *J. Rodney* of the third part, and *J. Milbanke*, since deceased, of the fourth part. After reciting that Sir *W. Chambers*, Knight, made and duly executed his will, dated the 19th of June 1795, and that he thereby bequeathed to said *Jane Chambers* his son's wife *an annuity of 200*l.*, so long as she should continue to live in wedlock with her said husband, or in case of his death continued unmarried; but in failure of either of these conditions, her said annuity should cease and be void from the day of such failure: and Sir *W. G.* appointed *T. C. G. A.* and *R. B.* executors, &c. and died, &c. and his executors duly proved the will: and further reciting, that *Jane Chambers* the defendant, in her right, was entitled to a pension of 100*l.* granted by an Act of the *Irish* Parliament, passed in 1780, and payable to her as one of the younger children of the late *George Lord Rodney*, during her life: and further reciting, that divers differences had lately arisen between the defendant and *Jane* his wife, and that the defendant, in order to put an end to such differences, and to induce the said *Jane* his wife to continue to live with him, had agreed to treat her with all due kindness and regard, and to enter into the covenants and agreements thereafter contained, subject to such conditions and restrictions as are thereafter mentioned: it was by the said indenture witnessed, that in pursuance of the said agreement, and in consideration of 10*s.* &c. *George Chambers* and *Jane* his wife, bargained, sold, and assigned to the plaintiffs, their executors, &c. the said annuity of 200*l.* bequeathed to the said *Jane* by the said recited will of Sir *W. C.* and also

A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife, in case of their future separation, with the consent of such trustees or their executors, &c. is valid in law.

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the said pension of 100*l.* and all arrears and future payments thereof: and all the right, title, interest, trust, &c. legal and equitable, of the defendant and *Jane* his wife therein, upon the trusts, &c. therein mentioned, (viz.) as to the said pension of 100*l.* in trust to pay the same unto the said *Jane Chambers* or her appointee in writing, for her sole and separate use, whether she continued to live with her husband or not; and that it might not be subject to his debts, control, &c. And as to the said annuity of 200*l.*, in trust, from time to time, so long as the defendant and *Jane* his wife should live together, to apply the same, or so much thereof as the said plaintiffs and *John Milbanke*, or the survivor or survivors of them, or the executors, or administrators of such survivor should in their or his discretion think necessary, in the purchasing of wearing apparel and other necessities for the said *Jane Chambers*. And as to so much of the said annuity of 200*l.* as the said plaintiffs and *John Milbanke*, or the survivors or survivor, or the executors, &c. of such survivor should not deem necessary to be applied for the purposes last-mentioned, in trust, to pay the same to the defendant, his executors, &c. And upon further trust, in case any separation should thereafter take place between the said defendant and *Jane* his wife, with the approbation of the plaintiffs and *John Milbanke*, or the survivors or survivor of them, or of the executors, &c. of such survivor; or, in case of the death of the defendant in the lifetime of the said *Jane Chambers*, then and in either of the said cases, and so often as it should happen, that the plaintiffs and survivor of them, &c. did and should from time to time pay the whole of the said annuity of 200*l.* as the same should be received by them in such and the same manner for the benefit of the said *Jane Chambers* as therein was directed touching the said pension of 100*l.* And the defendant did thereby for himself, his heirs, &c. covenant to and with the plaintiffs, their executors, &c. that in case future differences should arise between the defendant and *Jane* his wife, and she the said *Jane* should on that account at any time thereafter find it necessary to live separate and apart from him, he the defendant should permit and suffer her to leave him, and from time to time and at all times thereafter to live, inhabit, and reside separate and apart from him in such place or in such family as she should think proper; and should not prosecute, disturb, or molest the said *Jane* or any person

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in

in whose house or family she should reside on account of her living separate and apart from the said *G. Chambers*, subject nevertheless to the condition or proviso in that behalf therein-after contained. And moreover, that in case the annuity of 200*l.* thereby assigned, should at any time during the life of the said *Jane Chambers* cease to be payable, he the defendant, his heirs, &c. should from thence pay unto the plaintiffs, their executors, &c. during the natural life of the said *Jane*, one annuity of 200*l.* by equal quarterly payments from the time the said annuity of 200*l.* under the said will of Sir *W. C.* should cease to be payable; upon trust that the plaintiffs, and the survivor of them, and his executors, &c. did and should pay the same to and for such and the same intents and purposes, and in such and the same manner as therein before was declared touching the said annuity of 200*l.* thereby assigned; the first payment of the said annuity of 200*l.* to begin at the end of three calendar months next after the said annuity of 200*l.* under the said will should cease: as by the said indenture, &c. appears. The plaintiffs then averred, that afterwards, to wit, on the 1st *January* 1799, at, &c. the said *John Milbanke* died: and that after his death, to wit, on the 10th *August* 1799, at, &c. a separation did take place between the defendant and *Jane* his wife, with the approbation of the plaintiffs: and the said *Jane Chambers*, from the time of the said separation to the commencement of this suit, hath lived separate and apart from, and hath failed to live in wedlock with her said husband; by reason whereof the said annuity of 200*l.* so given by the said will of the said Sir *W. C.* did cease and become void from the time of such failure of the said *Jane Chambers* to live in wedlock with her said husband. The declaration then stated, that three quarters of the annuity of 200*l.* became due after such separation, which were unpaid; and that the defendant, though requested, had refused to pay the same, &c.

Pleas. 1. That at the time of the said supposed separation between the defendant and his wife, to wit, on 10th *August* 1799, the said *J. Milbanke* was alive; and traversing his death at the time, &c. as stated in the declaration; on which issue was joined. 2. Protesting that the supposed separation, &c. did not take place with the approbation of the said *J. Mil-*

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banke, avers that *J. M.* on the said 10th of *August* mentioned was alive, &c. To which there was a demurrer, shewing for special cause that the defendant had therein tendered an immaterial issue, and had attempted to put in issue a fact not alleged in the declaration; and for that the said 10th of *August* is not in the declaration materially alleged: but the substance of the allegation there is, that the separation between the defendant and his wife took place after the death of *J. Milbanke*, &c.

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Williams, Serjt., in support of the demurrer (after observing that it was not attempted to support the plea (*a*), but that it was meant to be insisted that the declaration was bad, on account of the illegality of the covenant providing for the future separation of husband and wife) contended that such a covenant was neither illegal nor immoral, but was warranted by analogies in the law, and by direct authority. 1. It cannot be objected that a covenant to provide for the future separation of husband and wife is void as militating against the policy of the law, when it must be admitted that such covenants have long been established by repeated decisions in cases* where separation has actually taken place. They must both stand or fall together; and all the arguments which can be urged against the one have been urged against the other, and overruled above a century ago. If it be illegal to provide for the possibility of a future separation, as tending to facilitate such an event, it cannot be less so to abet and support an actual separation, and thereby impede a reunion of the parties. Besides, the principal object of this deed was to make an end of the differences which are recited to have existed between the parties before that time. Where a husband and wife had agreed to live separate (*b*), and she was allowed a separate maintenance; and the husband pretending, as it is said, a desire to be reconciled to her, which she refused, forcibly took

(*a*) Upon this occasion the Court found fault with the paper books sent to them, in omitting to notice in the margin the points intended to be argued, as required by a late rule of Court of *H. 58 Geo. 3.* which they observed was not then a new regulation, but rather a revival of an old rule made in *E. 2. Jac. 2.* (*Vide 2 Tidd's Pract.* 669, 670.) They observed, that upon the present occasion their attention had been entirely diverted from the real point intended to be litigated, by looking to the cause of demurrer assigned.

(*b*) *Lister's case*, 3 *Mod.* 22.

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her into his custody,—the Court so far recognized this species of contract that they set her at liberty, saying that the agreement should bind them both till both agreed to cohabit together again. This was again recognized in *Mary Mead's* case (*a*), where the Court held such an agreement to be a formal renunciation by the husband of his marital right to force his wife to live with him. So in *Seeling v. Crawley* (*b*), an agreement for separation upon certain terms to be performed by the husband and the father of the wife was decreed by the Court of Chancery to be executed, on a bill filed by the father against the husband. The like was done in *Angier v. Angier* (*c*), and *Guth v. Guth* (*d*), upon bills respectively filed against the husband by the wife for a performance of articles of separation. One of the objections in the former case was, that it was in fact to decree a separation and alimony, which was usurping upon the jurisdiction of the Ecclesiastical Court: but this was denied by the Lord Chancellor, who observed, that the intent of the articles was to save the expence of a sentence in that Court, to supersede the necessity of an application there for alimony. It is therefore in furtherance of what the law would compel in case of the ill-treatment of the wife by the husband. Other cases have occurred, which, like the present, provide for future separation. Such was the case of *Nicholls and Danvers v. Danvers* (*e*), where the defendant, having before ill-treated his wife, gave her a note, that if he should again use her ill, she should have her share of her mother's estate (which was 3000*l.*) to her own use. And upon this happening, she and her brother filed a bill against her husband for this purpose; and the Lord Keeper decreed the interest of it to her for life for her maintenance, and afterwards to the husband for life, and the principal to the issue, if any: if none, to the survivor of the husband and wife. But he principally relied on the case of *Gawden v. Draper* (*f*), where the plaintiff declared in covenant or an indenture, whereby the defendant covenanted that his wife *Sarah* should live separately from him until they both gave notice by writing, attested by two witnesses, to cohabit again; and that during such separation he would pay to the plaintiff 300*l. per ann.* by quarterly

(*a*) 1 Burr. 542.(*c*) *Proc. in Chan.* 496.(*e*) 2 Vern. 671.(*b*) 2 Vern. 386.(*d*) 5 Bro. Chan. Cas. 614.(*f*) 2 Ventr. 217.

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payments for his wife's maintenance. It was then averred, that from the date of the indenture until the bringing the action, the defendant's wife lived separately from him, and that no such notice had been given, and that 75*l.* for one quarter was in arrear, &c. The defendant pleaded in bar a subsequent indenture, made between him and his wife of the one part, and the plaintiff of the other: which reciting the first indenture, and that the defendant and his wife did then cohabit, and that it was the true intent of all the parties that, as long as they did so agree to cohabit, the said annuity should cease; it was therefore covenanted by the plaintiff, that so long as the defendant and his wife should cohabit, the defendant should be saved harmless from the said annuity, and might retain it: and then averred, that ever since the last-mentioned indenture they did cohabit. The plaintiff replied, that they did not cohabit *modo et formâ*, &c.: to which the defendant demurred; and contended that the cohabiting again by mutual agreement, alleged in the last indenture and confessed by the demurrer, had dispensed with the circumstances of the notice in writing, &c. required by the first indenture. But the Court gave judgment for the plaintiff; for unless the cohabitation were according to the first indenture, it was no bar; the last deed not having taken away the effect of the former; and that the defendant could only have his remedy on the latter deed. The effect therefore of the first deed was evidently to provide for future separations; for it was admitted by the demurrer that the husband and wife had cohabited together after the first deed; and yet it was suffered to be put in force by the trustee of the wife against the husband for arrears occurring afterwards: the Court thinking the two deeds not inconsistent; though during the actual cohabitation at any time, the defendant would have a counter remedy upon the second indenture.

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Onslow, Serjt. contrâ. None of the cases come up in terms to the present; because in none of them was any provision expressly made in case of future separation, though incidentally that might be the case; and therefore the Court will not be inclined to extend the principle of those determinations an iota further than they are compelled by express authority to do: considering the very dubious ground on which they proceeded; and that in all probability if the question were now to arise for the

the first time, it would undergo very different consideration. That it is contrary to the policy of the law and to good morals, to enter into any contract which has a direct tendency to loosen the band of union between husband and wife, and to facilitate their separation, cannot be denied: and though the same objection in some degree applies to contracts for separate maintenance, even after an actual separation; yet it holds in a stronger degree before such separation; inasmuch as it is of more evil consequence to facilitate the happening of a mischief than to provide for it after it has happened. Besides, the public evil of such separations is greater or less in proportion to the illegality or immorality of the cause which produces them; of which no previous judgment can be formed, and upon which the Ecclesiastical Court alone are competent to decide. But these previous arrangements which make no discrimination between the causes of separation are more objectionable on that account, even if it be allowable for the parties themselves after the event to substitute their own judgment by way of contract in lieu of that forum which the law has provided. And not only the judgment of the trustees is so substituted in the place of the Ecclesiastical Court, but also that of their executors and administrators. And further, this deed not only makes provision for one future separation, but for any number of them from time to time. Most of the cases cited were in the Court of Chancery, which on many occasions exercises an equitable jurisdiction in making family arrangements; but no action of law could have been maintained on the agreements which were the foundation of those decrees, for want of a legal consideration. The only case at law is that of *Gawden v. Draper (a)*, which turned more upon technical rules of pleading, whether one covenant could be set up in bar to another: and though the plaintiff recovered, the Court gave no opinion on the legality of the prior deed, nor was it brought before them in argument. *Lister's* case (*b*) and *Mary Mead's* case (*c*) were merely interferences of the Court on *habeas corpus*, to protect the complainants from brutal violence, and no determinations on the effect of civil contracts for separate maintenance. But further: this deed is also in contravention of the intention of Sir William Chambers; and renders nugatory the condition which he annexed to the

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(a) 2 Ventr. 217.

(b) 8 Mod. 22.

(c) 1 Burr. 512.

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bequest to his son's wife by his will, and which she has enjoyed under it.

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Williams, Serjt. in reply observed, that the latter argument, though it were well founded (which he denied) could not avoid the covenant, it not being in contravention of any public law. That the period at which a contract was made could not determine its legality or illegality, if the subject-matter of it were the same, and the general law continued the same. That some of the cases mentioned by him before were stronger than the present; because there the feme covert herself was left to be the sole judge of the propriety of her living apart from her husband; whereas here trustees were interposed, who might be reasonably presumed to be more impartial judges. At any rate, it could not make it more objectionable that the agreement to live apart, and the right to separate maintenance, was to have the approbation of third persons. That as the case of *Gawden v. Draper* was an action of covenant for the separate maintenance, it was impossible that the attention of the Court should not have been called to the legality of the contract declared on.

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LORD ELLENBOROUGH, C. J. The question which has been agitated appears to have been laid at rest for a long period by repeated decisions and the uniform practice of the Courts. If it were now a new question, whether any contract could by law be made which tended to facilitate the separation of husband and wife, I should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contract: but they are now become inveterate in the law; and we cannot reject the present on that ground, without saying that all contracts which have the same tendency are vicious; which would extend, for aught I can see, to provisions for pin-money, or any other separate provision for the wife which tends to render her independent of the support and protection of her husband. This case does not differ materially from those which have been alluded to in the argument. The only difference is, that the covenant is not in conformity with the will of Sir *William Chambers*, the wife's father, which meant to give her the annuity of 200*l.* only during the period of her living with her husband. But this is not in contravention of any positive law, but only of the will of an individual. What in effect does this covenant do more than to recognize the rights

rights of the parties in certain situations, in which they are at liberty without such a covenant at any time to place themselves. The legality of contracts of separation were fully recognized in all the cases cited, and many more which might be mentioned; and without overturning all those, we could not say that this covenant is illegal. As to its tending to induce future separation, if it do so more than in the other cases, which I am not prepared to say, at least it had the merit in the first instance of establishing a reunion between the parties, and certainly there can be nothing vicious in such a provision. The case of *Nicholls v. Danvers* (a) strongly supports the doctrine contended for by the plaintiff's counsel. That was a note given conditionally by the husband to the wife to let her have the 3000*l.*, part of her mother's estate, for her separate use, in case he used her ill. That was a prospective provision, which was carried into effect by the Court of Chancery upon the event afterwards happening; and though the money was derived from the wife's mother, yet the husband would otherwise have been entitled to it by law and in right of his wife. The case of *Gawden v. Draper* does not, I think, go to the full length contended for. That was a provision for a separate maintenance until such time as the parties, by a certain instrument, should declare their assent to live together again: and the question raised by the plea was, Whether an actual cohabitation afterwards by consent, without its being so signified, and a covenant to retain the provision, before stipulated to be paid by the husband during such cohabitation, were a good plea in bar of the first covenant? But at least it shews that the first covenant was good in law; for otherwise the Court could never have given judgment for the plaintiff on the covenant declared on, be the merits of the plea what they might. And it cannot be supposed that the point could have passed without notice, though it do not appear in the report to have been discussed. But it has been so long established, and by so many decisions, that the Courts will give effect to contracts for separate maintenance, that it cannot now be called in question: and those cases, I think, govern the present.

GROSE, J. However we may lament the practice which is established, it is impossible for us at this day to say that agreements for separate maintenance are not considered valid both in

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(a) 2 Vern. 671.

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law and equity. The case of *Gawden v. Draper* was a decision in a Court of law, which establishes the general proposition for which it was cited; for unless the agreement there declared on were valid, the plaintiff could not have had judgment. And it is too much for us to say that the Court were inattentive, and did not know what they were deciding. Such agreements having been long acted upon, both in Courts of law and equity, we cannot now disturb those decisions.

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LAWRENCE, J. Not having had my attention previously called to the point intended to be discussed on these pleadings, I am not so well prepared as I should otherwise have been; but upon the discussion which has now taken place, I think the plaintiff is entitled to recover. I do not, however, think that the case of *Gawden v. Draper* goes the whole length for which it was cited; it only shews that in the case of an actual separation, a covenant for securing separate maintenance is good; up to that extent only is it an authority in point: but there was no provision there made for any future separation, in case the parties had once come together again after the making of the covenant. And the only question which arose on the second deed was, Whether in effect it amounted to a revocation of the former covenant, inasmuch as it did not shew that the parties had agreed to cohabit again in the manner and form there stipulated for. The Court thought that the two deeds were not inconsistent. But the case of *Nicholls v. Damers* is expressly in point for this purpose; for that was an agreement, not in consequence of any actual separation, but in contemplation of such, in case the husband afterwards used his wife ill. Now in this case it appears, that before the making of the deed the husband and wife had separated, and the great object of the deed was to bring them together again; but in so doing, and probably as one inducement to their reconciliation, it provided, that in case of any future cause of separation, instead of being obliged to have recourse to the Ecclesiastical Court of alimony, a domestic form should be erected to consider, Whether she should live separately from her husband, and have a separate maintenance? That was some check upon her, and was intended to operate as such. Upon the principle, then, of former decisions, this covenant does not appear to be invalid.

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LE BLANC, J. The situation of the wife was this: She had a pension of 100*l. per annum* from the *Irish* Parliament, and an annuity

annuity of 200*l.* under the will of Sir *William Chambers*; which latter was only payable to her as long as she lived with her husband, or, in case of his death, remained a widow. These were conveyed to the trustees in trust, as to the 100*l.* *per annum* for her separate use at all events; and as to the 200*l.* *per annum*, in trust to pay so much of it as they should deem necessary to her separate use while she lived with her husband; but in case of any future separation, then, as the annuity of 200*l.* would be no longer payable to her under Sir *William Chambers's* will, the trustees were to pay her the 200*l.* if they consented to such separation. It does not appear, therefore, that her situation was to be benefited by her separating from her husband. But it is objected, that any agreement of this sort is contrary to the policy of the law in respect to the marriage-state. But if so, the objection would have weighed as much in every case where the contract tended to facilitate separation between husband and wife. If the principle of such contracts be illegal, the Court cannot weigh the degree of facility; but every contract which at all facilitates such a separation must be void. Yet it has been holden that deeds of separation are not illegal; though the argument would apply as well as to those cases. I cannot see how it can be more illegal to contract for separate maintenance in case of future, than of present separation. Upon the same ground it might equally be objected that every provision by will or deed making a permanent provision for a wife apart from the controul of her husband, with whom she was then living, was illegal; because, by rendering her independent of him, it would facilitate their separation. Then it is urged, that this deed was in contravention of the will of Sir *William Chambers*: but that is not so; for it is no more in contravention of his will than if her own father, finding that his daughter was sufficiently provided for while she lived with her husband, had also provided for her in case of separation. That is a very frequent provision; which has been recognized to be legal again and again. The case of *Nicholls v. Dancvers* almost goes the whole length of the present. The note was there given by the husband to let his wife have the 3000*l.* in case he should again use her ill: that must have meant, in case she should be obliged to live separately from him, by way of separate maintenance; because to oblige himself to provide for her while she continued

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to live with him would have been useless; and that agreement was enforced by the Court of Chancery.

Judgment for the Plaintiffs.

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The KING against The Inhabitants of ECCLESTON.

Where the pauper agreed with a weaver to serve him for a year and a half, and the master was to teach him to weave, and the pauper was to have half his earnings and find himself in every thing; under which contract the pauper served his master for above a year; held that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and servant, and not that of master and apprentice.

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TWO justices by an order removed *Adam Davenport*, his wife and family, by name, from the township of *Little Bolton* to the township of *Eccleston*, both in the county palatine of *Lancaster*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The respondents proved a settlement gained by the pauper in *Eccleston*: after which the pauper, when about 15 years of age, went into the township of *Tonge* with *Haulgh*, and made a verbal agreement with one *Samuel Clough* there, who was a weaver of counterpanes, to serve him a year and a half. *Clough* was to teach him to weave counterpanes; and the pauper was to have one half of* what he earned; and the pauper was to find himself in every thing. Nothing else passed between them on making the agreement. The pauper worked under this agreement with *Clough* for the year and a half, except for a fortnight; during which he remained absent; but *Clough* however brought him back into his service, and obliged him to stay a fortnight over the year and a half, in order to make up the time he had been absent from his service. During the time of this service he slept constantly at his mother's house at *Little Bolton*.

Holroyd, in support of the orders, admitted that if the case of *Rex v. Little Bolton* (a) were law, the present could not be distinguished from it in principle; but contended that that case had since been over-ruled. There it was considered, against Lord *Mansfield's* first opinion, that an agreement of this sort, and service under it, might enure as a hiring and service in the relation of master and servant, though the latter were to be taught a trade, because he was not retained *eo nomine* as an apprentice. But this was holden otherwise in *Rex v. Highnam* (b), where the true nature of such contracts was considered to be that of an apprenticeship, and therefore that they could not, without de-

(a) *Cald.* 367.

(b) *Ibid.* 491.

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frauding the revenue, be made to enure as a hiring. And in *Rex v. Laindon* (a), Lord *Kenyon* delivered an express opinion against the authority of the first-mentioned case; which opinion was afterwards followed up in *R. v. Rainham* (b). The only difference between this case and *R. v. Laindon* was, that there the pauper gave his master a premium upon his entering into his service; but in *R. v. Rainham*, that was holden not to be essential to the constitution of an apprenticeship; for which nothing more is required than that the one should contract to teach, and the other to learn a trade. No technical words are necessary to constitute an apprenticeship. This is different from that class of cases, such as *Rex v. Martham* (c), where the party contracts to serve his master generally in other respects, as well as in the particular business which he was to be taught. For though it is first stated generally that the pauper in this case was to serve his master for a year and a half, yet the nature of the service is afterwards explained; and is shewn to have been confined to the learning to weave. And if the intention of the contracting parties be to govern the decision of these cases, then the Sessions, by disaffirming the settlement in *Little Bolton*, have in effect found that the parties meant to contract the relation of master and apprentice, though they have failed in their object for want of a proper instrument duly stamped.

Topping and *Scarlett*, contrà, relied on the case of *Rex v. Little Bolton* (d) as in point; which, they said, was not intended to be over-ruled by the Court in the cases of *R. v. Laindon* (e), and *R. v. Rainham* (f); both which turned on the intention of the contracting parties to create an apprenticeship. This was expressly adverted to by Lord *Kenyon*, in *R. v. Laindon*, as the ground of his opinion: though he also threw out some objections to the case of *R. v. Little Bolton*, so far as it seemed to establish the necessity of an apprentice being retained *eo nomine*; and *Le Blanc, J.*, whose opinion proceeded on the same ground, expressly distinguished the case then in judgment from that of *R. v. Little Bolton*. In the other case of *R. v. Rainham*, it was immaterial to consider, whether the contract were to serve as an apprentice or as a hired servant: since in either case the pauper, having served above a year, gained a settlement. If indeed the parties intend to contract the relation of master and

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(a) 8 Term Rep. 379.

(b) Ante, 1 vol. 531.

(c) Ante, 1 vol. 239.

(d) Cald. 367.

(e) 8 Term Rep. 379.

(f) Ante, 1 vol. 531.

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apprentice, and do it defectively, as in those cases, it cannot enure as a hiring and service: nor if it be done fraudulently, in order to avoid the stamp duty, as in *R. v. Highnam* (a); which was the real ground of that determination, and sufficiently distinguishes it from *R. v. Little Bolton*. The last-mentioned case is supported by many others; as *R. v. Hitcham* (b), *R. v. Buckland Denham* (c), *R. v. Birmingham* (d), *R. v. Alton* (e); all which shew that contracts to work at a particular trade only may yet constitute the relation of master and servant between the parties; though, as in *R. v. Hitcham*, and *R. v. Mart-ham* (f), the servant were to be taught by his master. And in *R. v. Cottishall* (g), where the contract was to serve the master for the purpose of being taught a trade, but the servant also agreed to do any other work; Lord *Kenyon*, after saying that the latter circumstance was decisive, observed, as to the teaching the trade, that it was deemed no more than equivalent to part of the servant's wages.

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LORD ELLENBOROUGH, C. J. I give a reluctant assent to the case of the *King v. Little Bolton*; but as the case now before us is in terms the same as was there decided, I think it is better to abide by that determination than to introduce uncertainty into this branch of the law; it being often of more importance to have the rule settled than to determine what it shall be. I am not, however, convinced by the reasoning of that case; and if the point were new, I should think otherwise. I should consider, as Lord *Kenyon* said in *R. v. Laindon*, that if the relation of master and apprentice be created by the contract of the parties; though they do not use the very words *master* and *apprentice*, yet if they use words tantamount, it is sufficient. The word *Apprentice*, he observed, was taken from *apprendre*, to learn; and what was that but an apprenticeship, where the purpose of the contract was for one man to teach, and the other to learn a trade? Then what was this intended to be? I should have said, upon general reasoning, that where the contract was, that the master should teach the other a trade, and the latter was to do nothing ulterior the employment in that trade, it was a contract *apprendre* in the true sense of the word: and being defective in this case, for want of proper legal formalities, it could

(a) *Cald.* 491.(b) *Burr. S. C.* 439.(c) *Ibid.* 694.(d) *Dougl.* 333.(e) *E. 24 G. 3. 2 Const.* 332.(f) *Ante*, 1 vol. 239.(g) *5 Term Rep.* 193.

not enure as a contract of hiring as a servant. However, as Lord *Kenyon* did not think proper to over-rule the case of the *King v. Little Bolton* in terms; though he disapproved of what was there said; and as it was not overturned in the case of *Rex v. Highnam*, or *Rex v. Rainham*, for the reason I at first gave, I think it better to concur in that decision, however unwilling I should have been to have done so in the first instance.

GROSE, J. This case so exactly resembles that of *Rex v. Little Bolton*, that I cannot distinguish them.

LAWRENCE, J. It is of infinite consequence in these cases, that what has been once expressly determined should be adhered to. The case referred to is directly in point; and not having been over-ruled, it ought to govern the present. The *King v. Laindon* and the *King v. Rainham* are both very distinguishable from the present.

LE BLANC, J. The case of the *King v. Little Bolton* is a direct authority to the present point; and that case has never been over-ruled in terms; neither do I think that it has been over-ruled in principle.

The Orders quashed.

The KING against The Inhabitants of CORSHAM.

Wednesday,
May 19th.

TWO justices, by an order, removed *Mary*, the wife of *Charles Isaac*, and their five children by name, from the parish of *Kington St. Michael*, in the county of *Wilts*, to the parish of *Corsham*, in the said county. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court, on a case stating,

That the pauper's husband, *Charles Isaac*, was born at *Box*, in the county of *Wilts*; and about fourteen years since was hired for a year, and served the same in the parish of *Colerne*: that he was afterwards hired by Mr. *Dalmer*, of *Corsham*, at four guineas *per annum*; with whom he continued to serve till within a fortnight or three weeks of the expiration of the year: when, upon a dispute between him and his master, he, in consequence of his master's kicking him, would not stay; but went to his father's house in *Kington St. Michael*. In the course of the following week, and before the end of the year, he returned with his father to Mr. *Dalmer's* house, and received the whole of his

A servant hired for a year departed from his master some short time before the end of the year, on ill usage, but received his whole year's wages, and something over: held that he thereby gained no settlement, he having refused to serve out the year when required by his master.

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wages, and half a crown over for himself: his master asked him to stay; but he refused, and went back to his father's house.

Jekyll and Williams, in support of the order of Sessions, said, that, according to the case of the *King v. St. Peter, of Mancroft, in Norwich (a)*, it was the province of the Sessions to draw the conclusion, whether the contract of hiring were dissolved, or whether the master only dispensed with the service; and by confirming the order of removal to *Corsham*, they had virtually found that there was a dispensation only of the service. This too was the proper legal conclusion; for it has been long settled, that a master shall not, by injuriously turning away his servant, defeat his settlement; and here the master compelled the servant to depart by his maltreatment in the first instance; and, what is material, the master paid him his wages up to the end of the year; and something over, as a compensation. Then if the remainder of the service were once dispensed with, the master could not compel the completion of it against the servant's will, though the contract still subsisted in law.

Casberd, contrà, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The cases of *Rex v. Grantham (b)*, and *Rex v. Upwell (c)*, have decided the present question. In both of them there was a payment by the master of the whole year's wages, and a departure from the service before the end of the year against the will of the master; and in both, the Court held that no settlement was gained. There is nothing material to distinguish this case from those; and therefore it is better to abide by them. Whether there were a dissolution of the contract, or a dispensation of the service, is indeed a question of fact, but of fact mixed with law: and the Sessions, having stated all the circumstances, have sent us the case, that we may draw the proper legal conclusion¹.

GROSE, J. This is not like the cases where the master has turned away the servant, to prevent his gaining a settlement; for the master wished him to stay, and the pauper refused: then the payment of the whole year's wages by the latter was merely to prevent an action, and argues no consent on his part to dispense with the service.

The other Judges concurred.

Orders quashed.

(a) 3 Term Rep. 477.

(b) 3 Term Rep. 754.

(c) 7 Term Rep. 458.

DAVISON *against* FROST.

1802.

Wednesday,
May 19th.

A RULE was obtained, calling on the plaintiff to shew cause why common bail should not be entered, instead of special bail, &c.; which was grounded on an objection to the writ of *latitat*, whereon the defendant had been arrested, and holden to bail for 177*l.* for that the sum for which he was arrested was not inserted in the *ac etiam* part of it.

Marryatt shewed cause, and contended, that even if it were necessary before the stat. 12 *Geo.* 1. c. 29, to state the sum in the *ac etiam*, it was no longer so since that statute. Before the stat. 13 *Car.* 2. st. 2. c. 2, a defendant was liable to be arrested and holden to bail on a common bill of *Middlesex* or *latitat* for any sum, though the particular cause of action were not expressed in the writ, to prevent which, that statute provided that no person arrested upon any bailable process, wherein the true cause of action was not particularly expressed, should be compelled to give security for his appearance in any sum exceeding 40*l.* In consequence of this, and in order to preserve the jurisdiction of civil causes to *B. R.* to the same extent as before, the *ac etiam* clause was invented, in which the true cause of action is expressed, in addition to the general complaint of trespass, which gives the Court jurisdiction. Still, however, the evil continued; for a plaintiff might insert what sum he pleased in the *ac etiam*; and therefore the stat. 12 *Geo.* 1. c. 29, enacts, that no person shall be holden to bail upon process out of the superior Courts for less than 10*l.*; and that an affidavit of the debt shall be made, and that the sum sworn to therein, shall be indorsed upon the back of the process; and that the sheriff shall not take bail for more. The insertion therefore of the sum in the *ac etiam* is wholly nugatory; because neither the sheriff nor the party is bound by it, but only by the sum sworn to and indorsed on the back of the writ. He referred to *Turing v. Jones*, 5 Term Rep. 402.

Lawes, in support of the rule, relied on the uniform practice, which had been needlessly departed from in this instance, in omitting to state the sum in the *ac etiam*. Much of the practice of the Court depends on positive rules and known precedents, rather than on general reasoning; and it would be very inconvenient to break in upon it, though its utility may not be apparent.

An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process, is irregular, and he cannot be holden to special bail thereon.

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rent: by the same mode of argument, the whole of the *ac etiam* clause might be omitted in the writ, since the use of it was superseded by the affidavit to hold to bail and the indorsement on the writ. It ought, however, to appear on the face of the writ itself, whether or not it be bailable process. The indorsement is only to ascertain the amount, and has reference to the contents of the writ.

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The Court took time to inquire into the practice; and the next day, Lord *Ellenborough*, C. J. said, that the writ was irregular in the frame of it, as not being in conformity to an old rule of Court of 1729 (*a*), which gave the form of the *ac etiam* clause, in which is stated the amount of the debt, and by which the practice had ever since been regulated.

GROSE, J. added, that the settled forms of proceedings ought to be adhered to; and all novel attempts to vary from them, without the authority of the Court, ought to be discouraged,

Rule absolute.

H. 2 G. 2.
 1729.

(*a*) *Regula Generalis*, H. 2 G. 2. 1729.—It is ordered, That where any defendant shall be arrested by virtue of any process issuing out of this Court, in which the cause of action shall be specially specified and expressed; or a copy of such process shall be delivered to any defendant, according to the form of the statute in such case made and provided; and the plaintiff thereupon shall declare, the defendant in such case shall not have liberty of imparling, without leave of the Court in that behalf first to be granted; but shall plead thereunto within the time allowed by the course of the Court to defendants sued by original writ; and for want thereof, judgment may be entered against such defendants by default (*b*).

Notice fixed in the *K. B. O.*

Ac etiams.

All clerks and attornies that intend to proceed according to the above rule, are to take notice, that in suing out such writ they do not insert in the *ac etiam* the whole declaration at length; but only describe the cause of action shortly, according to the specimen hereunder set forth, varying the same as the nature of the action shall require:

Of a plea of trespass; and also of a bill of the said *Q.* against the aforesaid *D.* for fifty pounds, for divers goods, wares, and merchandizes sold and delivered to the said *D.* by the aforesaid *Q.* according to the custom, &c.

(*b*) This rule is now enlarged to process in common form: *Trin.* 5 & 6 G. 2. *M.* 10 G. 2. and stat. 5 G. 2. c. 27, by which it is enacted, That no special writ nor process specially expressing the cause of action shall issue, unless the cause of action amount to 10*l.*

1802.

The KING *against* BINGHAM, Clerk.Thursday,
May 20th.

A RULE was obtained, calling on the defendant to shew cause why an information, in nature of *quo warranto*, should not be exhibited against him, to shew by what authority he claimed to be bailiff of the manor and borough of *Gosport*, in the county of *Southampton*. This rule was obtained on affidavits, stating that the bishop of *Winchester* was lord of the manor and borough; and that, from time immemorial, a court leet and court baron had been holden every year about October, by the bishop or his steward, within and for the same; and that a jury and homage assembled at such courts have immemorially, from time to time, exercised the privilege of choosing the bailiff of the said manor and borough, and also the constables, overseers of the ferry, ale-conners, coal-meters, and cryer, by the custom of the manor, &c. to act for the then ensuing year; and that the steward or his deputy has always attended the Court, and sworn in the said bailiff and other persons so chosen to their respective offices: that entries of such proceedings were invariably made in the records from 1683 to 1800; and that, prior to 1683, no usage to the contrary could be traced. It was also deposed to be part of the duty of the bailiff to summon the jury and homage who were required to attend the Courts, which he had immemorially performed; he selecting from amongst the inhabitants of the manor and borough sixteen proper persons for that purpose. It was then stated, that at a court leet holden in *October* 1800, the jury and homage so summoned by the then bailiff, and sworn by the steward, *R. Forbes* was by them nominated to be bailiff for the then ensuing year; which nomination was signified to the steward, who refused to swear in *Forbes*, declaring to them, that the bishop had chosen *Mr. Bingham* (the defendant): and that the latter had since then acted as bailiff.

Information in nature of *quo warranto* lies for the office of bailiff of a court leet, being a prescriptive officer having power to summon and select the jury.

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In answer to which it was sworn by the defendant and others, that the bishop, by writing under his hand and seal, appointed the defendant his bailiff, to collect, receive, and recover from the tenants of the manor, for the bishop's use, all rents, heriots, reliefs, perquisites and profits, payable to the lord, &c.; by virtue of which the defendant had since executed the said office of bailiff, the duties of which were to collect the lord's rents and revenues,

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revenues, to summon the jury and homage to attend the said Courts, to attend there himself, and to execute the precepts of the lord and his steward. The affidavits then stated matter in contradiction of the right of the jury and homage to elect the bailiff; and endeavoured to explain the practice which had prevailed, by shewing that, from the year 1687, the book of entries of the manor courts contained no presentments of bailiffs by the jury and homage, until 1719, when the custom first originated in consequence of the then bishop having leased all the tolls, dues, and profits of the manor, to twelve inhabitants of *Gosport*, most of whom had been in the habit of serving on the jury, and one of which number had usually been presented to serve this office: That the lease granted for 21 years had been renewed from time to time till very lately; and during its continuance, the lords of the manor had not intermeddled with the appointment of the bailiff.

Gibbs and *Sturges* shewed cause against the rule. The bailiff is no more than the servant of the lord; and it is not disclosed that he has any other public function to perform than that of summoning the jury, which may be done by any other whom the lord may direct to act in that respect: it is not therefore such an office for exercising which the Court will grant this information: neither can it be conceived that the tenants of the manor from whom the bailiff is to collect the lord's rents and dues should be appointed by themselves, or any other than the lord himself. Properly, it is the business of the lord or his steward to summon the jury; but though they may have always done this by their servant the bailiff, that will not alter the nature of his employment, or convert that which is a private into a public office. The Court must be satisfied before they grant the rule, that the defendant has been guilty of an usurpation on the franchise of the Crown. This is a mere ministerial officer; and not a judicial officer like the steward. In *Rex v. Boyles* (a) an information was granted against the defendant, to shew by what authority he claimed to be bailiff of a ville; but that went on the ground that it was an office of great trust and pre-eminence in the town, affecting the government of it, and the administration of public justice. In *Rex v. Mein* (b) it was said by Lord *Kenyon*, that the office must be of

(a) 2 *Str.* 235. 2 *Ld. Raym.* 1559. S. C.

(b) 3 *Term Rep.* 598.

magnitude

magnitude sufficient for the Court to notice it by way of information, in nature of *quo warranto*. There the defendant was portreeve and returning officer: a churchwarden has much more important public duties to perform than this defendant can be pretended to have; and yet the Court, in *R. v. Shepherd (a)*, refused to grant even a rule to shew cause. They also argued upon the merits of the case.

Burrough, in support of the rule.—The bailiff is stated to be a prescriptive officer, and therefore a member of the court leet, whom the lord cannot drop at his pleasure, but must exercise the entire franchise granted to him, in the manner prescribed by the Crown; and part of the franchise so granted is to be exercised by this officer. The importance of his function is not the question. The steward is, in many respects, the servant of the lord; yet such an information lies without doubt against him (*b*). Then how is that distinguishable on principle from the case of a bailiff? Both claim by the appointment of the Crown; which is the true criterion on which these cases turn. It appears that the bailiff is always sworn in: that shews that he is a public officer. But besides that, he not only summons the jury, but selects such of the tenants as he pleases for this purpose; which is a very important function in the administration of justice. He is as much a branch of the Court as the steward. There is no other convenient method of trying the right but this; for there are no fees annexed to the office (*c*): but even if there were, that is no answer to an information for usurping any franchise of the Crown; otherwise it might be given in almost every case.

LORD ELLENBOROUGH, C. J. There appears to be sufficient doubt raised upon the fact by the affidavits, to induce us to put the matter into a course of inquiry before a jury, provided this be such an office for which it is fit to grant an information in nature of *quo warranto*. I do not doubt that the office, as appendant to a court leet, is such for which the information will lie. My doubt has been whether, according to what was thrown out by Lord Kenyon in *Rex v. Mein*, it is of sufficient consequence

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(a) 4 Term Rep. 381. (b) *Rex v. Hulston*, 1 Stra. 621. Vide *Rex v. Carr*, and *Andr.* 14, and *Rex v. Bridge*, 1 Bl. 46.

(c) This was said in answer to an observation thrown out in the course of the argument by Lord Ellenborough; that the question might as well be tried in an action for money had and received.

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and magnitude to warrant our interposition in this form. But an observation urged at the Bar has had weight with me, which is, that the bailiff is an officer having a discretionary power as to the persons whom he should select for the jury, which is a material function to exercise. Then having no fees annexed to his office, there is no other convenient civil mode of trying the right to it.

The other Judges concurring,

Rule absolute,

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May 26th.

WILSON and Others against HODGES and Another.

Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death.

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IN debt on recognizance of bail, the breach assigned was, that *Michell*, the principal, had not paid the damages, nor rendered himself, &c. according to the form and effect of the said recognizance. *Plea*, That after the judgment, &c. and before the suing out the writs of *scire facias*, and before the return of the writ of *capias ad satisfaciendum* against * *Michell* upon the judgment, he, *Michell*, died: concluding with a verification. *Replication*, That after the giving the judgment, and before the suing out of the said writs of *scire facias* or either of them, the plaintiffs sued out a writ of *capias ad satisfaciendum* against *Michell*, returnable, &c. to which the sheriff returned *non est inventus*: and the plaintiffs further say that *Michell*, at the said return of the said writ of *capias ad satisfaciendum*, and afterwards, was living, &c. which they are ready to verify. *Rejoinder*, That *Michell* was not at the said return of the said writ of *ca. sa.* living, as the plaintiffs had replied; concluding to the country: on which issue was joined.

At the trial before *Le Blanc*, J. at the Sittings at *Guildhall*, the only question was, Whether the issue lay on the defendants to prove the death of *Michell*, or on the plaintiffs to prove that he was alive at the time mentioned! The learned Judge thought that the proof of the issue lay on the defendants, who averred the death of the party; and they not being prepared with any proof of the fact, the verdict passed for the plaintiffs on that ground. To set aside which, *Erskine* obtained a rule *nisi* in the last Term, on the ground of a misdirection, as well as on affidavit. *Gibbs* was now to have shewn cause: but

Lord ELLENBOROUGH, C. J. said, there was no doubt but that the direction of the learned Judge was proper in point of law

law. And he referred to the case of *Throgmorton v. Walton* (a), where it was decided, That where the issue is upon the life or death of a person once shewn to be living, the proof of the fact lies on the party who asserts the death; for that the presumption is, that the party continues alive until the contrary be shewn.

However, as the defendants swore that they had been misled by an opinion taken, which stated that the issue on these pleadings lay on the plaintiffs; and as circumstances were deposed to, which went to prove the death of the principal as stated,

The Court let the defendants into a new trial on payment of costs.

Rule absolute.

(a) 2 Roll. Rep. 492.

PARKINSON *against* LEE.

Thursday,
May 20th.

IN assumpsit, the first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant five pockets of hops at a certain price, the defendant promised to deliver to him the same, *and that the hops should all be of like goodness and quality, with a certain sample of the hops contained in each of the five pockets, and then produced and shewn by the defendant to the plaintiff.* It then stated that the plaintiff, confiding in the defendant's promise, afterwards bought the hops, &c. and that afterwards the defendant delivered to the plaintiff five pockets of hops as and for hops of like goodness and quality with the respective samples so as aforesaid produced and shewn to the plaintiff: yet that the defendant did not regard his said promise, but thereby deceived and defrauded the plaintiff in this respect, that the hops contained in each of the five pockets so delivered to the plaintiff, at the time of the delivery thereof, to him were not hops of like goodness and quality with the respective samples, but were much inferior, &c. and were bad, damaged, and unsaleable hops; whereby the plaintiff lost the benefit of selling the same, &c. and gaining large *profits, &c. The second count stated the contract to be, that in consideration that the plaintiff would buy of the de-

Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable; though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he

purchased) such seller is not answerable, though the goods turned out to be unmerchantable.

defendant

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defendant five other pockets of hops at a certain price, the defendant promised the plaintiff to deliver to him the same, "and that the same should be good, sound, and merchantable hops;" and then alleged the purchase and delivery, as before, of so many pockets of hops as and for good, sound, and merchantable hops; yet that the defendant did not regard his promise, but thereby deceived and defrauded the plaintiff in this respect, that the said hops at the time of the delivery thereof to the plaintiff, were not good, sound, and merchantable hops; but on the contrary, were bad, damaged, and unmerchantable; whereby, &c. There were other common money counts, concluding to the plaintiff's damage of 200*l.* Plea, non-assumpsit.

At the trial before *Le Blanc, J.* at the Sittings after last *Michaelmas* Term at *Guildhall*, it appeared that the plaintiff and defendant were both dealers in hops. In *January* 1800, the five pockets were purchased by the plaintiff of the defendant, warranted to answer the samples by which they were sold. They were not, however, removed till the 8th of *July* from the defendant's to the plaintiff's warehouse. The price paid was 16*l.* 5*s.* per cwt. which was the fair market price at the time for good merchantable hops. Previous to, and at the time of the sale, the samples answered fairly to the commodity in bulk; and no defect was perceptible at that time to the buyer: but owing to the grower of the hops having fraudulently watered them after they were dried, before they were originally purchased by the defendant (a fraud to which the defendant was not privy, and of which he was wholly ignorant at the time of the sale), it was discovered a few days after the removal of them to the plaintiff's warehouse, that one of the pockets was so much heated as to be in an unsaleable condition: which pocket was thereupon immediately returned to the defendant, who received it back, and allowed for it in settling the account for the other hops, which was done on the 18th of *October* following. In the intermediate time, however, it was found that the other four pockets were in the same unsaleable condition from the same cause; but, owing to the plaintiff having first attempted to maintain an action against *Clarke*, the grower, under the mistaken supposition that the defendant was only acting as his agent (which action was afterwards discontinued on finding that the defendant was not agent but vendee), the present action was

not

not commenced till upwards of a twelvemonth after the transaction, and after a refusal by the defendant to allow for the rest of the pockets. It appeared further, that the object of watering hops after they are dried, is to give them weight; but the effect of it is, after some months, to cause them to heat and corrupt in the pockets or bags into which they are packed, till at last they become quite unfit for sale. This effect is not produced on the sample, which is usually taken from the middle of the bag, by means of its exposure to the air. It is impossible even for the best judges of the commodity always to detect this fraudulent practice for some time afterwards, by any inspection of the sample or of the commodity itself in bulk, till it is disclosed by the gradual process of heating. However, by the latter end of *July* 1800, the effects of it were apparent in all the pockets; and at the time of the trial, although the samples still continued as at first, the commodity in bulk was become perfectly unmerchantable. Upon this evidence the learned Judge left it to the jury to find for the defendant on the first count, if they were satisfied that the commodity agreed at the time with the sample by which it was sold, and there was no fraud on his part; notwithstanding any latent defect in the commodity in bulk unknown to the parties, by which it became afterwards deteriorated. But he instructed them, that if they were satisfied that the commodity, at the time of the sale, had such a latent defect as no prudence or skill of the buyer could, on inspection, detect or guard against, the plaintiff was entitled to recover on the implied warranty in the second count, although the seller had no knowledge of such latent defect; it being the understanding of both parties to such a contract, though not expressed in the special warranty, that the one was to sell and the other to purchase a merchantable commodity. He also left it to the Jury to consider whether the plaintiff, by delaying so long to proceed against the defendant, had thereby waived his remedy against him? which the Jury answered in the negative; and found for the defendant on the first count, as the commodity answered in fact to the sample at the time of the sale, without fraud, and he had then no knowledge of the latent defect of the commodity. And they gave a verdict for the plaintiff on the second count, considering that there was an implied warranty in the seller

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that the commodity was in a merchantable state at the time of the sale.

A rule *nisi* was obtained in the last Term for setting aside the verdict and having a new trial on the ground of a misdirection of the Judge in point of law, and of a defect of evidence to support the finding of the jury on the second count.

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Lambe now shewed cause, and contended, that notwithstanding the proof of an express warranty by the defendant, the seller, that the commodity should answer the sample, the performance of which was found by the Jury for the defendant, there was also an implied warranty in every contract of this nature, where a fair price was to be given, that the commodity should be in a merchantable condition at the time of the sale; otherwise the buyer might receive a different thing from that which he stipulated for, and which it was the understanding of both parties that he should have. In *Stuart v. Wilkins (a)*, it was contended by the defendant's counsel, and not denied, that there were two sorts of warranty; 1. expressed; 2. implied. That was the case of a warranty of a horse; where the plaintiff declared in *assumpsit*; and held well, because such a form was adapted to let in both proofs, if necessary. A person, by stipulating expressly for a particular quality or the like in a commodity, cannot be understood as thereby relinquishing all claim to the general soundness and marketable state of such commodity; if so, the greatest inconvenience would ensue in trade, and no man would venture to make a specific contract, for fear of omitting any thing which would otherwise be implied in common good faith and the usage of trade, which is bottomed in confidence. In a policy of insurance there is no express stipulation that the ship shall be sea-worthy; but that is holden to be implied; and therefore the want of knowledge in the assured that the ship has a latent defect which renders her not sea-worthy, is no answer to the breach of such implied warranty.

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If one agree to purchase iron at the market price, which the seller warrants to be *Russian*, that does not exclude the implied undertaking that it shall be marketable iron. So if one stipulated to purchase wine of such a vintage for a fair price, it would be no answer to an action for delivering sour wine, that it was of that vintage. So a custom in a country that tenants

(a) *Dougl.* 20.

shall have the way-going crop after the expiration of their term, is good, though they held by deed, without such stipulation (a). It is true that a sound price does not in itself necessarily import a warranty of soundness; but it is a circumstance from whence the Jury may collect what was the real contract between the parties. It may be different where a defect is apparent on the face of a commodity; there it may fairly be presumed that the buyer exercised his own judgment upon it; at least it was his own fault if he did not: but this was a latent defect, which no prudence or sagacity of the buyer could detect; against such he gives credit to the seller. Whatever natural defects or infirmities are incidental to the subject-matter, the buyer must take the risk of; such as those with which horses are afflicted; such as the perishable nature of all sorts of goods: to such defects the maxim *caveat emptor* applies; but the latent defect of the hops in this cause arose from the fraud of man, which the buyer at a fair price has no reason to contemplate. Here the substance of the issue was, Whether or not the buyer contracted for the purchase of the commodity with all latent defects: which the verdict of the Jury has negatived, and it was a question for their consideration.

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Erskine and *Espinasse*, in support of the rule, relied on the maxim *caveat emptor*; their being neither warranty nor fraud on the part of the defendant. This was a latent defect originating in the fraud of the grower, but wholly unknown to the seller at the time; for which, therefore, nothing but an express stipulation can render him liable to the buyer: all that he engaged for was, that the commodity was answerable to the sample by which it was sold: and that is found by the Jury. Where a sale is by sample, provided the sample be truly taken, it is the same as if the buyer had examined the commodity in bulk; therefore both parties must be taken to have the same opportunity of knowledge. No implied warranty can be raised from a fair price in the sale of hops any more than in the sale of a horse, where it is admitted that it not does exist. Neither is there any ground for distinguishing between the latent defects or infirmities of the one and the other: both may originate from the act of man operating by natural means. Every person entering into a contract in the course of trade, is presumed to

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(a) *Wigglesworth v. Dallison*, Dougl. 201.

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have a competent skill to enable him to judge of the commodity he bargains for. He knows the defects to which it is liable, as well from fraud as from natural causes, and he speculates accordingly. In the instance put, of purchasing wine, if the sample as well as the pipe contained in it the principle of future acidity, though not then perceptible to the palate of the individual purchaser, and the only warranty was, that the pipe answered the sample, it is clear that the seller would not be bound to stand to the loss. Where else can the line be drawn? and what degree of future deterioration from pre-existing causes will be sufficient to set aside the contract? Implied warranties may arise out of known usages of trade, because both parties are presumed to have engaged on such known terms: but here no usage was proved for the seller to stand to the loss; on the contrary, witnesses engaged in the hop-trade were called by the defendant to shew, that in the understanding of the trade the buyer was to stand to the risk of latent defects: but the learned Judge refused the evidence, as amounting to no more than opinion. If then an implied warranty be to be raised in this, it must in all other cases of sale: and then the maxim of *caveat emptor* will become an exception instead of a general rule.

GROSE, J. This is a case of considerable consequence; because the rule laid down in this case must extend to all other cases of sales, not governed by particular usages of trade in this respect. The question is, Whether in the case of a sale, made under the present circumstances, there be any implied undertaking in law, that the commodity be merchantable? No express undertaking is proved to that effect; and there is no fraud imputed to the defendant. The mode of dealing is, that the plaintiff buys hops from the defendant, whom he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has an opportunity of judging by the samples such as he finds them at the time. If he doubt the goodness, or do not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist

on a warranty; and if we *were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy, which existed before the case in *Douglas*. Before that time it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord *Mansfield* rejected it, and said there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action. Here neither has been shewn; the defendant merely sold what he had before bought upon the same mode of examination. Therefore I think there ought to be a new trial.

LAWRENCE, J. I agree with my brother *Grose*, that there is no ground for the plaintiff to recover. It is not pretended that the defendant has been guilty of any fraud or imposition in the sale; and I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered to sale, which might, or might not have a latent defect: this was well known in the trade: and the plaintiff might, if he pleased, have provided against the risk, by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing, as he must have known, as a dealer in the commodity, that it was subject to the latent defect which afterwards appeared, he bought it at his own risk. I know of no authority which makes the seller liable for a latent defect where there is no fraud; and no representation was made by him on the subject to induce the buyer to take the thing. In [322] *1 Roll. Abr.* 90. P. it is said, that if a merchant sell cloth to another, *knowing* it to be badly fulled, an action on the case in nature of deceit lies against him, because it is a warranty in law. But there is no authority stated to shew that the same rule holds if the commodity sold have a latent defect, not known to the seller. So again, the case is there put: If a man sell me a horse with a secret malady, without warranting it to be sound, he is not liable: that is, if there be no fraud. The instances are familiar in the case of horses. It is known that they have secret maladies, which cannot be discovered by the usual

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trials and inspection of the horse; therefore the seller requires a warranty of soundness, in order to grant against such latent defects. Then how is this case different from the sale of a horse, where it is admitted that the buyer must stand to all such latent defects. To pursue the analogy still further: on the sale of real estates, the seller submits his title to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title: but though it should turn out to be defective, the purchaser has no remedy, unless he take a special covenant or warranty; provided there be no fraud practised on him to induce him to purchase. If there be, as is said, many frauds practised in the trade of hops, that may require more caution on the part of the buyers to protect themselves by taking warranties; even that will not affect the present contract, which was no more than that the bulk should agree with the sample; which it was proved to do at the time of the sale: and as the seller undertook for nothing more, he cannot be answerable in this case.

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LE BLANC, J. The inclination of my mind at the trial was, that the jury should find for the plaintiff; because the drawing of fresh samples, or the inspection of the commodity itself in bulk, would have afforded no information to the buyer, as to the latent defect which afterwards appeared: and therefore it occurred to me, that as there was no want of prudence on the part of the buyer, and the defect was of such a nature that no inspection of the thing could have led to a discovery of it, the law would on that account raise an implied undertaking on the part of the seller, that it was a merchantable commodity, such as it appeared then to be. But, upon further consideration, as the same rule which applies to other cases must govern this: and as in the only instances in which the same question has come directly in judgment, namely in sales of horses, it has been considered that, without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects: and as I see no ground for distinguishing between this case and those; and no instance has been produced in which a contrary rule has been laid down in respect of any other commodity, I therefore concur with my brothers, that there should be a new trial.

Lord ELLENBOROUGH, C. J. then observed, that as he had been concerned in the cause, he had forborne taking any part in

in the deliberation with the rest of the Court; but having now heard their opinions, he must declare his entire concurrence with them in the judgment they had delivered.

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Rule absolute.

CASTLING against AUBERT.

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Friday,
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THIS was an action on the case, to recover damages for a breach of an agreement, which was tried at the Sittings after last *Trinity* Term; when a verdict was found for the plaintiff for 25*l.* subject to the opinion of the Court, on the following case.

The plaintiff was employed by one *E. P. Grayson*, as his general agent; and, as an insurance-broker, had effected for his use certain policies of assurance mentioned in the declaration, of the value of 3000*l.* That the plaintiff was under acceptances for *Grayson*, for bills drawn by *Grayson* for his own accommodation; and that the plaintiff had a lien on the said policies to indemnify himself against his said acceptances. That a loss having happened on the policies of insurance which the under-writers had agreed to pay, but which *Grayson* could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands *Grayson* had at that time transferred the management of his insurance concerns. That some of the plaintiff's said acceptances for the use of *Grayson* being then outstanding and unpaid, and particularly the bill for 181*l.* 1*s.* mentioned in the declaration, then in the hands of one *Cator*, upon which writs had been sued out (though not then executed) against *Grayson*, as the drawer, and the plaintiff as acceptor, the plaintiff refused to deliver up the policies of assurance, they being the only securities he had against his said acceptances, without an indemnity; and that thereupon a meeting was held between plaintiff and *defendant and *Grayson*, at which it was verbally agreed between the parties, that the defendant should pay into the hands of a banker 712*l.* 13*s.* 6*d.* to answer in part certain other acceptances of the plaintiff's, exclusive of the bill for 181*l.* 1*s.*; and that the plaintiff should provide 241*l.* 14*s.* 6*d.* towards pay-
against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received.

The plaintiff, a broker, having a lien on certain policies of insurance, effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the under-writers; which was accordingly done, and the money was afterwards received by the defendant: held, that this was not a promise for the debt or default of another within the statute of frauds: and that the plaintiff might recover the payment of the

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ing one of his acceptances for 350*l.*; and that the defendant should pay the bill of 181*l.* 1*s.* and the costs of the action which had been brought thereon against *Grayson*, amounting together to 202*l.*; and that thereupon the said policies should be delivered up to the defendant. That, in pursuance of this agreement, the defendant paid into the banker's hands 712*l.* 13*s.* 6*d.*, and the plaintiff delivered up the policies to the defendant. That the defendant received from the under-writers the amount of other subscriptions (*a*) on the policies so delivered up to him by the plaintiff. That the defendant was afterwards called upon by the attorney of *Cator*, to pay the said 202*l.* for the debt and costs on the bill in *Cator*'s hands, but refused to do so: nor had he paid it at the time this action was commenced; and that, in consequence of such refusal, the plaintiff was arrested at the suit of *Cator*, as acceptor of the said bill of exchange, and sustained damages thereby to the amount found by the Jury. The question for the opinion of the Court was, Whether the promise of the defendant to pay the said 202*l.* due from *Grayson*, for the said debt and costs, on having the policies of assurance delivered to him, was void under the statute of frauds? or, Whether he were liable by reason of the plaintiff's parting with the possession of those policies, upon which the plaintiff had a lien, and which were so deposited with the defendant.

[327] *Espinasse* for the plaintiff contended, that the statute of frauds (29 *Car.* 2. c. 3. s. 4.) was no bar to the plaintiff's recovery in this case, as it only applied to cases where there was no consideration for the promise; where there was neither benefit to the defendant, nor damage to the plaintiff, but only a mere parol undertaking by the one to the other to answer for the debt or miscarriage of a third person. Whereas here, the plaintiff having made himself responsible by his acceptances for *Grayson* to a large amount, and having security in his hands to that extent, was induced to part with such security to the defendant, in consideration of his undertaking to provide for those acceptances. There was therefore a loss to the plaintiff, and a beneficial consideration to the defendant. The construction of the statute was much canvassed in *Pillans v. Van Mierop* (*b*). *Wilmut*, J. said, "If it be a departure from any right, it will

(*a*) To an amount, as was stated at the Bar, much beyond the sum in dispute.

(*b*) 3 *Burr.* 1663, 1672, 1673.

“be sufficient to graft a verbal promise upon.” Now here was a departure from the plaintiff’s lien on the policies. *Yates, J.* in the same case said, “Any damage to another, or suspension, or forbearance of his right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrue to the party undertaking.” Here the damage to the plaintiff is the loss of his security, the value of which has been received by the defendant, if that were necessary to sustain the plaintiff’s right of action. And according to *Buller, J. (a)*, it is sufficient to sustain a promise that there be either a damage to the plaintiff, or an advantage to the defendant. The statute of frauds has always been confined in its application to collateral undertakings for a third person, and where at the time there was a subsisting debt or duty due by such third person to the party to whom the collateral undertaking was made. The undertaking must be for the debt of another already contracted. *Read v. Nash (b)*. But there was no debt due at the time from *Grayson to Castling*; the latter had only given the former his acceptances; but they were still outstanding and unpaid. The case of *Williams v. Leper (c)*, is directly in point; where a broker, being employed to sell the goods of an insolvent for the benefit of creditors, in order to prevent the landlord of the insolvent from distraining, gave him a parol promise to pay the rent in arrear if he would desist: and this was holden not to be within the statute of frauds, inasmuch as the landlord had a lien on the goods, a legal pledge, the parting with which was a good consideration for the promise. So in *Meredith v. Short (d)*, the delivering up to the defendant a note given to the plaintiff by a third person, was ruled to be a good consideration for a promise to pay the amount; as in *Love’s case (e)*, a promise by a third person to the sheriff to pay the debt, if he would restore the goods of the debtor taken in execution, was holden good.

Gibbs, contra, contended that the promise was void by the statute of frauds; which did not merely avoid parol promises by a third person to pay the debt of another, but also to answer for his default or miscarriage. This then, if not a promise to pay an existing debt, was at least a promise by the defendant to answer for the default or miscarriage of *Grayson*, in case he did not indemnify the plaintiff for his acceptances when they be-

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(a) *Cooke v. Oxley*, 3 Term Rep. 654.(b) 1 *Willis*, 305.(c) 3 *Burr*, 1336.(d) *Salk*, 25.(e) *Ibid*, 23.

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came due, and were paid by him on *Grayson's* account. The plaintiff was bound to pay his acceptances when due: when paid, the amount would constitute a debt from *Grayson* to him: and this is a promise by the defendant to pay that which *Grayson* would be bound to pay: that is, provided *Grayson* himself did not discharge the obligation. It is no answer to say, that if there be a direct consideration passing between the plaintiff and the defendant, though with reference to the debt or default of a third person, it takes the case out of the statute: for then the statute was unnecessary and nugatory; for, even before the statute, there must have been some consideration passing between the parties to support the promise, otherwise it was *nudum pactum*: the statute therefore must have been intended to attach on cases where there was such a consideration: but the construction contended for, operates as a repeal of it. The only case which presses against the defendant, is that of *Williams v. Leper (a)*; which, however, is distinguishable from the present: for there, if the landlord had actually distrained the goods and sold them, it would have been a satisfaction and extinguishment of the debt as between him and the tenant. While the landlord held a competent distress, he had, as it were, a special property in the goods, and could have no other remedy for his original demand. The promise then by the broker was a new debt, and not a collateral undertaking for the debt or default of another. At the time when the new consideration attached between those parties, the old debt of the tenant was extinguished; whereas here, after the promise by the defendant, the plaintiff still had his remedy against *Grayson*.

[330] *Lawrence, J.* You argue as if the landlord there had made an actual distress; but he had only given notice of his intention so to do.

Lord Ellenborough. The mere agreement with the broker there not to distrain, would not estop the landlord from afterwards distraining upon the tenant. Then if that case were not decided on the ground that the landlord had relinquished his principal remedy against the tenant, it cannot be supported at all, being in direct contravention of the positive words of the statute. *Grayson's* debt is still due, and he is still answerable for it to the plaintiff; and the defendant can only be liable upon

(a) 3 Burr. 1336.

his undertaking, because it is the debt of *Grayson*. In the case relied on, *Aston*, J. considered that *the goods* were the debtor, and that the broker was not bound to pay the landlord more than they sold for; and on that ground alone he agreed with the rest of the Court. He also referred to *Chater v. Beckett (a)*, to shew that where the old debt remains, no new or additional obligation will take the case out of the statute in respect of the original demand.

Lord ELLENBOROUGH, C. J. at the close of the argument, observing that there was a count for money had and received, said, that the plaintiff was entitled to recover upon that count, even upon the ground suggested by Mr. Justice *Aston* in the case of *Williams v. Leper*; for the defendant had received money to a much larger amount from the under-writers upon the policies. His Lordship afterwards continued:

I am clearly of opinion, that this is neither an undertaking for the debt, default, or miscarriage of another within the statute. It could not be for the *debt*, but rather for the *credit* of another; for when the promise was made, no debt was incurred from *Grayson* to the plaintiff, therefore, if at all within the statute, it must be for the default or miscarriage of another. But see what the case is: The plaintiff, who was *Grayson's* broker, had policies of insurance in his hands belonging to his principal, which were securities on which he had a lien for the balance of his account; and on the faith of these he agreed to accept bills for the accommodation of his principal. One of these bills became due, and actions were brought against the plaintiff as acceptor, and against *Grayson* as drawer: and it was desirable that the policies should be given up by the plaintiff to the defendant, in order to enable the money for the losses incurred to be received from the under-writers; the defendant undertaking, upon condition the policies were made over to him, to settle the acceptances due, and lodge money in a banker's hands for the satisfaction of the remainder as they became due. The defendant then procured from the plaintiff the securities upon the faith of this engagement; in entering into which he had not the discharge of *Grayson* principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of *Grayson* would eventually follow.

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(a) 7 Term Rep. 201.

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It is rather therefore a purchase of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking, without writing, charge themselves for the debt, default, or miscarriage of another. In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there: but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. Upon the whole therefore, I agree with the decision in *Williams v. Leper* to the full extent of it: I agree with those of the Judges who thought the case not within the statute of frauds at all: and I also agree with the ground on which Mr. Justice *Aston* proceeded, that the evidence sustains the count for money had and received.

GROSE, J. I agree with the case referred to on both grounds, and think it would be improper to over-rule it.

LAWRENCE, J. This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so.

LE BLANC, J. This is a case where one man having a fund in his hands which was adequate to the discharge of certain incumbrances; another party undertook that, if that fund were delivered up to him, he would take it with the incumbrances: this, therefore, has no relation to the statute of frauds.

Postea to the plaintiff,

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LEE against CLARKE, in Error from C. B.

Friday,
May 21st.

In an action
on a penal
statute, the

declaration must allege the fact to be done *contra formam statuti*, or *statutorum*, as the case may be: stating that *by force of the statute* an action accrued, &c. is not sufficient, where the penalty is given by one statute, and the right of action to the informer is given by another. *Scemle* where the record was entitled generally of *Hil. 41 G. 3.* and the fact was laid under a viz. on 21st of January, 1801, whereas the return of the *capias* must have been at latest on 20th January, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error.

Sensu

next before the commencement of this suit, to wit, on the 21st of *January* 1801, at &c. unlawfully used a certain engine called a Snare, to kill and destroy the game of this kingdom, he the said *Daniel*, not being then and there qualified by the laws of this realm, nor having any lawful authority so to do; whereby, *and by force of the statute in that case made and provided*, an action hath accrued to *John Clarke*, to demand and have of and from the said *Daniel* five pounds. Plea, *nil debet*. After verdict and judgment for the plaintiff below in *C. B.* a writ of error was brought in this Court, and the following errors assigned:—

1. That the supposed offence is not alleged to have been committed against the form of any statute or statutes, not being an offence at common law.
2. That the supposed cause of action is alleged to have accrued to the plaintiff below, by force of the statute in that case made and provided: whereas the same accrued, if at all, by force of several and different statutes, made in different sessions of parliament, and not by any one statute.
3. That the plaintiff below commenced this suit against the defendant before the cause of action mentioned accrued:
4. That the cause of action is therein stated to have accrued within six *calendar* months next before the commencement of the suit; whereas by law an action upon such cause of action, ought to be brought within six *lunar* months next after, &c.
5. It is not averred in the declaration that the plaintiff below commenced his suit before the end of the second Term after the supposed offence committed.
- Nor, 6. That he was the first person who sued the defendant for the said penalty.

Dampier for the plaintiff in error. 1. No offence is stated at common law, nor averred to be done against any statute: it is only said that the statute gives the action. Now the statute which gives the action is not the same which constitutes the offence. The penalty is given on summary conviction by the statutes 5 *Ann.* c. 14. and 9 *Ann.* c. 25. Then the stat. 8 *Geo.* 1. c. 19, gives an action to a common informer to recover half the penalty. And lastly, the stat. 2 *Geo.* 3. c. 19. s. 5, gives the

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Semble if a statute give an action within six months after the fact committed (by which must be understood *lunar* months) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed after verdict that the fact was proved within due time, notwithstanding such irrelevant allegation. *Semble* that a declaration for a penalty on killing game in an action brought for the whole penalty on the stat. 2 *G.* 3. c. 19. s. 5, and prior statutes need not allege the fact to have been committed within two Terms before the action commenced, according to stat. 26 *G.* 2. c. 2. the stat. 2 *G.* 3. having allowed six months.

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whole penalty to the informer, which is now sought to be recovered. Therefore, the present action is founded in part upon all the statutes. A statute may, for a thing actionable at common law, give an action to another than the party who could have sued at common law; as in the case of the assignee of a bail bond, and in the case of a replevin bond: but here the offence, which is not actionable at common law, is not averred to be so by the statute. It ought to have been alleged, that the thing done for which the penalty was given, was against the form of the statute. Formerly it was holden necessary to recite a statute where it created a new offence; *Com. Dig.* action on stat. *G.*; though now it is deemed sufficient for the declaration to shew a case within the statute; but still it must conclude *contrà formam statuti*, 1 *Ventr.* 103; otherwise the question could never have arisen in many cases, whether the conclusion should have been *contrà formam statuti*, or *statutorum*; for in either case it would have been surplusage. A penal action requires nearly the same strictness as an indictment (*a*). 2. The two statutes of *Ann* give the penalty in this case, and two other statutes give the action as now framed, viz. the stat. 2 *Geo.* 1. c. 19, gives the action to the informer for half the penalty, and the stat. 2 *Geo.* 3. c. 19. s. 5, assuming that the action is given by the prior statute, enables the informer to sue for the whole penalty: but the provisions are not incorporated, as they are different with respect to costs; therefore penalty and the form of action being given by different statutes, the conclusion ought to have been against the form of the statutes, and not of any single statute: according to *Dingley v. Moore* (*b*), and *Broughton v. Moore* (*c*), and *Talbot's* case there cited. 3. The suit appears to have commenced before the cause of action accrued. The record is generally of *Hil.* 41 *Geo.* 3. and the day laid is the 21st *January* 1801, whereas the return of the *capias* must have been at latest on the first return of the Term, namely the 20th *January*, the day before the cause of action is alleged. This action being commenced in *C. B.* the reasoning in *Pugh v. Robinson* (*d*), does not apply; for the cause of action must in this case precede the return of the writ. 4. The offence is alleged to have been committed within six *calendar* months before the

(a) Vide 2 *Hawk. P. C.* c. 25. s. 116, 117.

(c) *Cro. Jac.* 112.

(b) *Cro. Eliz.* 750.

(d) 1 *Term Rep.* 116.

commencement of the suit; whereas the stat. 2 Geo. 3. c. 19. s. 5, mentioning *months* generally, must be taken to mean *lunar* months; and therefore, consistent with this averment, which alone the plaintiff was bound to prove at *nisi prius*, he may have sued too late. And the averment cannot be rejected as surplusage; because the action being founded on a statute, the plaintiff must aver every matter requisite to entitle him to the action. *Com. Dig.* action on stat. A. 3. *College of Physicians v. Bush*, 4 Mod. 47. [Lord Ellenborough. Notwithstanding the allegation, that the offence was committed within six calendar months, &c. yet if it were not committed within the time prescribed by the statute before the commencement of the suit, the plaintiff must have been nonsuited. *Lawrence, J.* The time having lapsed would have been evidence for the defendant on the plea of *nil debet*. The argument goes the length of assuming, that if no time whatever had been alleged, it would have been sufficient for the plaintiff, at *nisi prius*, to have proved the offence committed at any time before the action commenced; which cannot be pretended.] It might, perhaps, have been requisite, if no time had been alleged, to have proved the offence committed within six lunar months before; but there being a direct averment of another period, it would have been a sufficient answer to the objection, if the proof had referred to a period beyond the six lunar months, but within the six calendar months, to have said that the plaintiff was only bound to prove what was expressly alleged; and that the objection, if any, was open upon the record. 5. It ought also to have been averred, that the action was commenced before the end of the second Term after the offence committed; to which period it is limited by the stat. 26 Geo. 2. c. 3.; and though the stat. 2 Geo. 3. c. 19, says within six months, yet that would not in all cases extend the time given by the former statute: so that the latter only operates as a repeal *pro tanto*; and both statutes are still in force, and must be taken to have limited the action to be commenced within six months, provided it do not extend beyond two Terms. The words in the last statute are negative words, and not words of extension. The 6th error is not material to be insisted on.

Wood, contra. 1. In an action on a penal statute, it is not necessary to aver that it is *contra formam statuti*; it is sufficient if so much be stated as brings the case within some public statute.

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As was said in *Coundell v. John* (a), that “where a statute introduces a new law, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude *contrà formam statuti*,” but if a statute give the same action, with a difference of some circumstances, as double damages, &c. the plaintiff must either conclude *contrà formam statuti*, “or make his case so particularly within the statute, that it may appear to be so.” In another report (b) of the same case, Lord Holt is made to say, “If no action lies at the common law, and you may have an action by a general statute, then if you bring yourself within the description of such statute, you need not conclude *contrà formam statuti*: so it was agreed in the year 1656, when *Roll* and *Newdigate* sat here.” The cases cited *contrà* are indictments or informations, which differ from the present. But if it be necessary to shew that the action is framed on a statute, the conclusion here, “whereby and *by force of the statute in that case made* an action hath accrued,” &c. is sufficient for that purpose. 2. The action given to this plaintiff to sue, is only by *one* statute: and therefore the conclusion in the singular number is proper. The penalty indeed was created by the stat. 5 *Ann.*; but the plaintiff sues only upon the stat. 2 *Geo. 3. c. 19. s. 5.*

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Le Blanc, J. Would you have been satisfied to have added that statute after the averment in the count?

3. There is a positive allegation that the fact was committed before the commencement of the suit: therefore, at most, there is only a repugnancy of date, which is no error, but may be rejected as surplusage. *Adams v. Goose, Cro. Jac. 96.* 4. This error assigned is repugnant to the last; for as that stated that the suit was commenced before the cause of action accrued, that it was not commenced soon enough after the cause of action accrued; for that it is only alleged within six calendar months, whereas it should be brought within six lunar months. But the answer already given by the Court is sufficient; the allegation itself was unnecessary, and may be rejected; and after verdict the Court will presume that the fact was proved within due time. 5. It was not necessary to allege the action commenced within two Terms, as well as six months, which is the period allowed by the last statute: but at any rate the answer last

(a) *Salk.* 505.

(b) *Holt's Rep.* 654.

given will equally apply to this objection. 6. If this plaintiff were not the first who sued for the penalty, that should have been pleaded in bar.

LORD ELLENBOROUGH, C. J. To some of the errors assigned, an answer has already been given by the Court: such as those with respect to the allegation of the time within which the action was commenced, being stated to be within six *calendar* instead of *lunar* months, and not stated to be within two Terms. The allegations were not material; and we cannot now presume that the fact was not proved to have happened within the time prescribed by law for the commencement of the suit. It also strikes me that there is no weight in the third error assigned. A repugnancy of date on the record is no error: the Court will suppose that the cause of action existed, as it is averred, before the action was commenced. But I cannot so well dispose of the first error, that the offence for which the penalty is given is not alleged to be against the form of the statute; it being clear that this was no offence at common law, and only made so by the statute. Such an averment has always been considered necessary; otherwise the cases alluded to, which turned on the distinction between such averments in the singular or plural number, according as the offence arose out of one or more statutes, could never have arisen; for the answer would have been, that either was unnecessary. The only authority which seems to bear the other way, is that referred to in *Salkeld*: but that was not a penal action. It does not distinctly appear but that the subject-matter might have been a ground for an action at common law. But at most, it is an anomalous case, against the current of authorities. Also as to the second error, it might admit of considerable question whether it should not have been laid against the form of the statutes, where the right of action is given by more than one statute. What was by *Warburton, J.* in *Owen* 135, is an express authority in point to this purpose: "If a statute doth prohibit a thing, and another statute give a penalty, there, upon an information upon the penalty, both statutes ought to be recited, and to conclude *contra formam statutorum*: but where the statute is only revived, it is otherwise." However, I do not proceed on this objection. I rest on the first, that in an action for a statute penalty by a common informer, as well as in proceedings by indictment or information, it has been invariably holden that the fact must be alleged to be done

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done against the form of the statute. Some or all of the statutes referred to are essential to the maintaining this action: and I do not see such circumstances stated as brings the case within any of them, without alleging it to be against the form of the statute.

GROSE, J. I have always understood, that it was necessary to allege the fact to be against the form of the statute in the case of penal actions as well as indictments.

LAWRENCE, J. As to the first error assigned, that the count does not conclude against the form of the statute, I have always understood that to be necessary in these cases. In the case of indictments, to which this bears a close analogy, there is no question but it is so (*a*). The reason of which is, that every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor by reference to a statute shews that he means to proceed upon it: and without such express reference, if it be no offence at common law, the Court will not look to see if it be an offence by statute. This rule is laid down in *Doctrina Placitandi*, 332. (a book which has always been admitted to be of great authority in pleading, and was often quoted by Lord C. J. *Willes*) “that if “an action be brought on a statute, the plaintiff ought to rehearse the special matter, and say that the action is brought “*contrà formam statuti*.” For which is cited the year-book 9 *Ed.* 4. 26. But it is contended, that the conclusion here, “whereby and by force of the statute an action hath accrued,” &c. will supply the want of the other allegation. If it had said *statutes* in the plural number, perhaps that might have done: but it certainly is not sufficient with reference only to the stat. 2 *Geo.* 3. c. 19.; because that alone would not support the action. As to the other objection, upon the repugnancy of the declaration being intituled generally, &c. that might, I think, be gotten rid of as surplusage. It is no error.

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LE BLANC, J. I do not see how the first objection can be gotten over. The practice has always been to have such an averment: and a contrary determination in this case might let in a laxity of pleading not only in civil actions, but also in criminal proceedings.

Judgment reversed.

(a) Vide 2 *Hack. P. C.* c. 25, s. 116.

The next day Lord *Ellenborough* said, that the Court had looked more particularly into the case of *Coundell* or *Kendall v. John*, which is reported in *Salk.* 505. *Holt Rep.* 632—5. and *Fortes.* 125.; and upon comparing them, there did not appear to be that incongruity between that case and other authorities, which they had at first apprehended. In *Holt's Rep.* 635, the Chief Justice on finally giving the judgment of the Court said, "I do agree that you need not in an action on the statute conclude *contrà formam stat.*: but you must not say, *de placito transgressionis super casum*; yet you must say, *de placito transgressionis et contemptus contrà formam stat.*, and bring yourself within the description of the statute." And in *Fortescue's Rep.* Lord C. J. *Holt* is made to say, "You need not recite the statute itself if it be a public law, if you bring yourself within the law: and if you do not conclude *contrà formam statuti*, you must shew it at least by concluding *de placito transgressionis et contemptus*." It appears therefore to have been the ultimate opinion of the Court, that in all cases where the action is founded on a statute, it is necessary in some manner to shew that the offence on which you proceed is an offence against the statute.

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The KING against The Inhabitants of the West Riding of
YORKSHIRE.

Saturday,
May 22d.

AN indictment against the defendants for the non-repair of a public bridge (which was removed into this Court by *certiorari*) charged, That a certain common public bridge, called *Pace Gate Bridge*, otherwise *Kesh-Beck Bridge*, situate upon a certain rivulet, called *Keshbeck*, at the parishes of *Skipton* and *Fewston*, in the West Riding of the county of *York*, in the King's highway there, leading from the town of *Skipton*, &c. in, through, and over the several townships of *Bearnsley*, &c. to the town of *Knaresborough*, in the same riding, used for all his Majesty's liege subjects on foot, and on horseback, and with their

The county or riding is liable to the repair of a bridge built by trustees under a Turnpike Act, there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: *aliter* if built by him for his own benefit, and so continued, without public utility, though used by the public. A bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably, in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.

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carriages, &c. on the 22d of *November*, &c. was and yet is very ruinous for want of repairs, &c. against the form of the statutes, &c. and against the peace, &c. And that the Inhabitants of the West Riding of the county of *York* aforesaid, of right, ought to repair and amend the said ruinous bridge when and so often as need requires it.

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To this the defendants pleaded, that after the making of a certain Act of Parliament, in the 17 *Geo. 3. (c. 102.)* intituled, an Act for repairing and widening the road from the town of *Skip-ton*, to the turnpike road leading from *Leeds* to *Rippon*, near *Okbeck*, in the township of *Bilton*, with *Harrowgate*, and from thence to communicate with the road leading from *Knaresbro'* to *Wetherby*, in the West Riding of the county of *York*; to wit, on the 1st *December* 1779, the said bridge, in the said indictment mentioned, the same being and consisting of one arch made of stone and timber, was first directed and made by the order and direction of certain trustees, in the said Act of Parliament named, in pursuance of and according to the direction in the said Act in that behalf contained, and for the purposes in the said Act in that behalf mentioned, in and upon the said road, in the said Act mentioned; and that no bridge had ever been there erected or made, before the time of the making of the said bridge, in the said indictment mentioned, &c. To this there was a demurrer.

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Holroyd in support of the demurrer. The county at large is *prima facie* liable to the repair of all public bridges within its limits, in the same manner as parishes are bound to repair all public ways within their district, unless they can shew a legal obligation on some other persons or public bodies to bear the burthen. This is most explicitly stated by Lord *Coke* (a) in his comment on the stat. of bridges, 22 *H. 8. c. 5.* which was made in affirmance of the common law. The matter stated in the plea is no answer to the indictment; because, though the bridge in question were built by the trustees, yet the law not having imposed on them the burthen of repair, it necessarily devolves on the county: for the demurrer admits that it is a common public bridge, used for all the King's subjects. If indeed a miller make a new bridge over a new cut of water *for his own profit*, the county shall not be bound to repair it, though it be used by the public; according to 1 *Roll. Abr.* 368. But there it does not

(a) 2 *Inst.* 700—1.

appear to have been made for the common benefit; and the same book recognizes the general law. By 13 *Rep.* 33, it appears that others than the inhabitants of the county can only be charged *ratione tenuræ*, or by prescription in the case of bodies corporate, or as it is said on account of taking toll or other profit: but this latter must be understood of toll claimed by prescription or grant, upon condition of bearing the burthen of repair, and where the party takes such toll for his own profit; which does not apply to these trustees, against whom no indictment will lie for non-repair. Nor could they by any mode be made personally liable, or be made to lay out any thing beyond the amount of the tolls received; wherefore, if the expence of the repair wanted exceeded that sum, the public would be without remedy unless the county were liable. To an indictment against the county of *Middlesex*, for not repairing *Langforth* bridge (*a*), alleged to be an ancient bridge, the defendants protesting it was not an ancient bridge, pleaded that it was lately erected by the King for the benefit of his mills: and judgment was given for the King; though it do not expressly appear whether upon the form or merits of the plea. In *R. v. the County of Wilts* (*b*), *Northey*, Attorney-General, cited a case where it was adjudged, that if a private person build a bridge which afterwards becomes a public convenience, the county is bound to repair it. So *R. v. Bucknal* (*c*). The authorities on this subject were all considered in *Rex. v. the W. R. of Yorkshire* (*d*), in the case of *Glusburne* bridge, where to an indictment against the riding for the non-repair, the plea stated that there was an ancient foot-bridge over the same stream which the township of *Glusburne*, who were bound to repair it, took down, and in lieu thereof erected the carriage-bridge in question: and all the Court held the Riding liable to the repair on the general principle above stated by *Northey*. That case has been uniformly acted upon ever since; and in particular in the instance of *Lunsbeck* bridge, upon an indictment tried before Mr. Justice *Butler* on the Northern Circuit. If it were otherwise, the greatest inconvenience would ensue; for the subjects at large cannot know what particular persons are liable to the repair of public bridges; they can only resort to the county in the first instance, and they must be liable

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(*a*) *Cro. Car.* 365.(*b*) *Salk.* 352. and vide *S. C. Holt's Rep.* 310.(*c*) 6 *Mod.* 151. n.(*d*) 5 *Burr.* 2594.

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unless they can shew some other who is so bound. He also referred to several clauses in the particular Act in question.

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Lambe, contra admitted that the stat. 22 H. 8. c. 5, was in affirmance of the common law: but said it was to be collected from thence that the liability of the county to repair was confined to *ancient* bridges, the origin whereof, and by whom built and repairable, could not easily be traced, and therefore afforded a presumption that they were originally public works. It would be preposterous to suppose a law by which every individual might, by erecting a bridge over which others passed occasionally, thereby bring a great burthen on the public, not merely for the reparation, but in many instances for the entire rebuilding of it. If it had been supposed, that at any rate if the bridge were of public utility the county were bound to repair, it was nugatory to direct the magistrates, as the statute does, to inquire who were bound to the repair. Again, who is to decide, or by what rule, whether a bridge be of public utility or not? If a new bridge be so built as to occupy the whole highway, the public have no choice whether they will use it or not if they pass that way; although perhaps it were not desired, and the passengers might have passed as well without it: or the public would rather have suffered even a trifling inconvenience than have incurred the burthen of repair. The general rule contended for will have the effect of substituting the will or caprice of any private individual in the place of the public discretion. The passage in 1 *Roll. Abr.* 368. is against the principle contended for *e contra*; and so is 13 *Rep.* 33. which says, that he who has the toll ought to stand to the repair; which comes nearer to the present case than any other authority; for by the Act in question, the tolls which are collected on this road are vested in the trustees, by whom the bridge was built, for the very purpose of keeping it in repair. The *Glusburne Bridge* case (a) is distinguishable from this; for that was found to be *of public utility*, as well as constantly used by the public; and what is still more important, the justices of peace in Quarter Sessions, who are the trustees for the county in this respect, signified the public assent to its erection, by contributing to the expence of it out of the public stock: it may therefore be said to have been erected by and

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for the benefit of the county; in which case they could not discharge themselves by any protest from the burthen of future repair attaching on them by law. In another report of the same case (*a*) great stress is laid on the fact of its being of public utility: it is said to be the grand criterion. There was no necessity to traverse that this was a common public bridge, because the plea shews that before 1779 there was no bridge there; and therefore unless the county are bound to repair all new bridges erected by any persons, which the public may happen to use, they cannot be liable in this instance. The *Langforth Bridge* case (*b*) did not establish so general a position; for that turned on the form of the plea. And it was admitted by the Court in the *Glusburne Bridge* case (*c*), that if a man erected a bridge principally for his own benefit, though collaterally of benefit to others, the public had nothing to do with it. He also argued upon some of the particular clauses of the Act in question; particularly that the clause providing against the discharge of any riding, &c. or private person chargeable with the repair of any road or bridge by reason of tenure, or by any law, ancient usage, or custom, must necessarily refer to bridges antecedently built; such ancient bridges as were intended by the stat. 22 H. 8.

Holroyd, in reply, observed, that a bridge built by the trustees of a public road, under an Act of Parliament, must be taken to be of public utility in point of fact. That if a bridge built in a public road by an individual were not of public utility, but detrimental to the public, it would be indictable as a nuisance; and that would be matter of defence on the trial: but the demurrer, by admitting that it is a common public bridge used by all the King's subjects, has admitted its adoption by the public and its utility.

LORD ELLENBOROUGH, C. J. This is a case of great consequence indeed to the public: but after the decisions which have taken place, it does not appear to be of much difficulty. By the common law, counties are chargeable with the repair of public bridges; unless it be shewn as the stat. 22 H. 8. c. 5. says, "what persons, lands, tenements, and bodies politic, ought to make and repair such bridges." In the absence of such proof, that burden is, by the operation of the common

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(*a*) 2 Blackst. 687.(*b*) Cro. Car. 365.(*c*) 2 Blackst. 687.

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law, thrown on the inhabitants of the county in which the bridge lies. But in order to effect this, it is not enough that a new bridge shall be built in a highway used by the public; it must also be useful to the public; but enough is stated to shew that; the bridge being alleged to be in a public highway, and used for all the King's subjects: it is at least sufficient to throw the *onus* upon the inhabitants of the county of, shewing who else is bound to the repair, if they be not. I do not lay stress on the idea of the public having adopted the bridge, by passengers going over it; because if it occupy the highway, they cannot help using it: I only rely on the using of it so far as to shew that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If however, it be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county; and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act; and the bridge becoming of public benefit, the burden of repair ought properly to fall upon the public. Lord Coke, in his comment (a) on the stat. 22 H. 8. of bridges, after stating that particular persons are only bound *ratione tenuræ*, or by prescription; that is, *ratione tenuræ* in the case of private individuals; or by prescription, as against corporate bodies, puts this case: "But admit none at all were bounden to the reparation of the bridge, by whom should it be repaired, by the common law? The answer is, By the whole county, &c. wherein the bridge is, &c. because it is for the common good and ease of the whole county." Again he says, "if a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ* or *prescriptionis*." Now that this bridge is for the common good, is proved by the use of it by all the King's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair? The doctrine laid down by Lord Coke has been since recognized in the cases referred to, and in

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(a) 2 Inst. 700—1.

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other books; particularly, it was much considered in the case of *Glusburne Bridge* (a); upon the authority of which other cases have been since ruled, one of which was alluded to at the Bar, before Mr. Justice *Buller*. The rule laid down by Mr. Justice *Aston*, in the *Glusburne Bridge* case, seems to be the true one; "that if a man build a bridge, and it become *"useful to the county in general, the county shall repair it."* He says nothing about the adoption of it by the public; and there is good sense in not relying on that, except *as evidence* of its being a public bridge, and of utility to the public. Where it is stated to be used by the public, it cannot be presumed to be useless to them: but if intended to be objected to on the ground of inutility, it must be so stated in the plea. As to the objection, that it ought to be repaired by the commissioners of the turnpike by whom it was erected, and who have authority to raise tolls for the purposes of the Act, I cannot find any authority for them to erect bridges under this Act. Where it is necessary to cut drains in the adjoining lands, a power is given them to raise archs over such drains; but this is a bridge built in the highway. However, not to proceed upon any such narrow view of the case, I will suppose they were authorized to erect the bridge; yet no fund having been specially provided by the Legislature for the repair of it, the burden must necessarily fall where the common law has placed it, namely on the riding. I am aware of the extent of this opinion; and if the trustees under similar Acts throw this burden generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common law rule: and I see no reason to arraign the doctrine in the case in *5 Burr.* to which I have referred. If, indeed, as it is said in *1 Roll. Abr.* 368., a man make a new cut for the benefit of his mill, and build a bridge over it, he shall be bound to the repair of it. But that is a case where the party is guilty of a nuisance in the first instance in making a new cut across the highway, which the public might have prevented, and all along he continues it for his own benefit: the case goes no further than that, and does not apply to the present.

GROSE, J. In the present state of the country, when great improvements are carrying on, and convenient bridges are be-

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come very necessary, this is a most material question to be settled. It is no new point: for I well remember the *Glusburne Bridge* case,* which was most ably argued by the counsel for the riding, who was a profound lawyer, and had exerted great industry in looking into all the authorities on the subject; and the case was decided on great consideration. Since then, the same question has come before many of the Judges at *nisi prius*, and the same doctrine has been repeatedly considered and acted on. Those who then doubted on the subject did not sufficiently attend to this, that the stat. 22 Hen. 8. was founded on the common law: and the passages referred to in 2 *Inst.* are very strong to that purpose. Indeed, Lord *Coke* may be said to state this very case when he says, that if a man build a bridge for the common good of all the subjects, he is not bound to repair it. Then where no particular person is bound to the repair, how and by whom shall it be done? He had before answered that question,—that it shall be repaired by the whole county. Mr. Justice *Aston*, commenting on this doctrine in the *Glusburne Bridge* case, says that it does not relate to new bridges which are not of public utility, and used by the public. But the bridge in question appears to be of this description; and like that case, except in this particular, which is stated by the defendants themselves in their plea, that this bridge was erected by trustees of a turnpike road, under a public Act of Parliament; and there I cannot suppose that it was not a public bridge, built for the benefit of the public, and of public utility, and not merely for ornament or for private benefit. This case therefore comes within the rule laid down in 5 *Burr.*; which having been acted on ever since, it would be dangerous to draw into doubt. There may be attempts to make a colourable use of this doctrine, as by building bridges at first in a slight and imperfect manner, for the purpose of throwing the expence immediately on the county; but if that were shewn, I should think that it was a public nuisance, and indictable. The general doctrine, however, is too firmly established since the case in *Barrow* to be overturned.

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LAWRENCE, J. The principle to be collected from the case of *Glusburne Bridge* is, that if the bridge be of public utility, the county, who derive advantage, must support it. It so appears, both from the report in *Barrow* and in *Blackstone*. But it is said that we cannot collect that the bridge in question is of such

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a description. But when we observe that it was erected by trustees of a turnpike road, appointed by an Act of Parliament, we cannot suppose that it was erected for other purposes than for the public utility. Then this was assimilated to the case in *1 Rol. Abr.*, because it said that the trustees are empowered to take tolls. But that is supposing that the trustees are to derive some private advantage from the tolls, which is not the case: whatever tolls are raised, must be laid out on the maintenance of the roads. It might as well be contended, that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustess are in this case, because the bridge is built in the turnpike road. In truth, the trustees are merely substituted in lieu of the parish. The case of *Glusburne Bridge* has been affirmed by subsequent decisions. One of these was *The King against the Inhabitants of the County of Lancaster*, where a special verdict was found; which was argued before my brother *Le Blanc* and myself, sitting in bank at *Lancaster*. I mention this, because it was in a shape in which it might have been carried to another tribunal, if the parties had been dissatisfied with our opinion. He then read another case of *The King v. The Inhabitants of the West Riding of Yorkshire*, *M.* 28 *Geo.* 3. (*infra* (a)). On the authority of these

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(a) *The KING against the West Riding of YORKSHIRE.* *Mich.* 28 *G.* 3. * *B. R.* The inhabitants of the riding were indicted for not repairing a public carriage-bridge, which they were bound to repair, &c. Plea, that certain townships have immemorially repaired, and have been accustomed, and of right ought to repair the said bridge: and issue thereon. It appeared upon the trial that this had been a foot-bridge till the year 1745, when it was enlarged to a horse-bridge by the townships, and in 1755 to a carriage-bridge, at their expence. That the riding had never repaired it. There was another bridge which served for the same road.

The counsel for the prosecution insisted at the trial that the evidence did not prove the issue; which was, that the townships had immemorially repaired a carriage-bridge; as it appeared clearly that the carriage-bridge had been first erected within time of memory. And *Wilson, J.*, who tried the cause, was of that opinion: but the Jury found for the defendants.

the bridge to a carriage-bridge, which they had before been bound to repair as a foot-bridge, will not support the plea. Where townships have so enlarged a bridge which they were before bound to repair as a foot-bridge, they shall still be liable *pro rata*. Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it.

Where to an indictment against a riding for not repairing a public carriage-bridge, the plea alleged that certain townships had immemorially been used to repair the said bridge; evidence that the townships had enlarged

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these and the other cases mentioned, I agree that there ought to be judgment for the King.

* LE BLANC, J. If the Court felt any doubt upon the question, the magnitude of it would have induced them to have heard another argument. But the principle on which the case in *5 Burr.* was determined, and which equally governs the present, was not new even at that time: for it is laid down in *2 Inst.* that if a man build a bridge which is for the public benefit, the

A new trial was moved for, and *Wood, Heywood, and Lambe* for the defendants, shewed cause, by contending that though the evidence might not strictly support the prescription as laid; yet, if by another form of pleading the defendants would have been entitled to a verdict on the merits, the Court would not be inclined to set aside the verdict. That in order to charge the riding with the repairs of a bridge, it must at least appear that it was of public utility, which this was not; for the turnpike road run within a few yards, and it was stated there was another bridge. That the townships would thereby get rid of their obligation to support a foot-bridge. This was not like the case of *Glusburne Bridge, 5 Burr. 2594*, which was an entire new bridge, 60 yards distant from the old foot-bridge. This was the old foot-bridge widened.

The counsel on the other side were stopped by the Court.

ASHNURST, J. There must be a new trial; for by the general law it is established, that where a township or any private individuals build a new bridge and dedicate it to the public benefit, and it is used by them, the *onus* of repairing it will fall upon the county at large; for the county at large are bound to repair all public bridges, unless they can throw the burthen on some particular persons. Now here the riding have pleaded that these townships had been immemorially bound to repair this carriage-bridge; which cannot be true, as it appeared from the evidence that it was not made a carriage-bridge till a few years ago. Therefore there must be a new trial.

BULLER, J. The indictment states it to be a carriage-bridge, and the defendants in their plea admit it to be a carriage-bridge. But they allege that other persons are bound by prescription to repair it. Now there is no evidence whatever which tends to support that: on the contrary, it is shewn that this never was a carriage-bridge till within these few years, but was a foot-bridge, which was kept in repair by the townships. Where a party is bound to repair a foot-bridge, he shall not discharge himself by turning it into a horse or carriage-bridge; but still he shall only be bound to repair it as a foot-bridge; that is, *pro rata*: but otherwise the county are bound to repair all bridges of public utility.

GROSE, J. declared himself of the same opinion.

The Court offered the defendants liberty to amend on payment of costs, which not being accepted at that time (*a*),

Rule absolute.

(a) Qu. If the defendants did not afterwards amend their plea, before the second trial, and obtain a verdict?

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public must repair it. That has been acted upon down to the period when the *Glusburne Bridge* case was decided; and that has again been recognized in subsequent cases, and particularly in one instance, where the parties had an opportunity, if they had been so advised, of carrying it to the dernier resort. The question then is, Whether there be any distinction between this and the other cases? As to this not being expressly stated to be for the public benefit, it is sufficient, when the indictment states that the bridge was used for all the King's subjects. Then it is said that this was not built, as in other cases mentioned, by a private individual, but by trustees under an Act passed for making a public road. If, however, the cases are to be distinguished on this ground, this rather appears to be a stronger case than the others; because the bridge was built by trustees under an Act of Parliament, to which the defendants must be considered as parties and assenting, and by those to whom the Legislature have delegated the trust of determining whether it were proper to build the bridge: it is therefore a stronger case against the defendants than where an individual has in the first instance exercised his own discretion. If any inconvenience be to ensue from this decision, it must be provided for by the Legislature in future Acts of this description. The clause referred to in the Act which enables the trustees to cut drains and throw arches over them, is confined to grounds lying contiguous to the roads, and was merely for the purpose of excusing them from being considered as trespassers, and not by way of throwing on them an additional burthen of repairing such bridges. And the subsequent clause, which provides "that nothing in this Act contained shall be construed to be a discharge of any riding, &c. or person, for making, repairing, &c. any road, *bridge*, causeway, arch, drain, or sewer, which they have been accustomed, or of right ought to make, repair, &c. by reason of any tenure, or by any law, ancient usage, or custom," affords an argument that this Act was not intended to make any alteration as to the general legal liability under the stat. 22 H. 8. or by the common law, either as to the repair of roads or bridges. If this be the true construction, then it stands thus: certain persons are enabled by law to make a public bridge, and by the general law before public bridges were repairable by the public; and by the clause referred to, the Legislature in the particular Act have in effect provided, that notwithstanding that Act, the same persons should

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should continue liable, as were before liable, to the repair of bridges, &c. Then the defendants must be liable in this case, there being nothing shewn to exempt them, and throw the burden on others.

Judgment for the Crown (a).

(a) The KING *against* the Inhabitants of the County of Glamorgan. — An Indictment having been removed in *Hilary* Term 1788, by writ of *certiorari* into the Court of King's Bench, against the defendants, for not repairing a certain public bridge called *Ynispenbrech* bridge, erected in the King's highway, across the river *Tawe*; the defendants pleaded, that in the year 1745, *Herbert Mackworth*, Esq. being seised of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge; and that he and Sir *Herbert Mackworth*, his son, and their tenants of the tin works, enjoyed a way over the bridge for their private benefit and advantage; and therefore that Sir *H. Mackworth* ought to repair, *absque hoc*, that the inhabitants of the county ought to repair. The prosecutor replied, that the inhabitants of the county ought to repair. And upon the trial at the Summer assizes for the county of *Hereford*, before Lord *Kenyon*, the facts alleged in the plea were proved; and also, that the business of the tin works could not be carried on without the use of the bridge. But it also appearing that the public had constantly used the bridge from the time of its being built, his Lordship directed the Jury to find a verdict for the crown, viz. that the inhabitants of the county were bound to repair; which they did accordingly, and no motion was ever made for a new trial. Vide 1 *Bac. Abr.* 535. S. C. last edit. by Mr. *Gwillim*.

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Monday,
 May 24th.

The KING *against* PINKERTON.

Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant, after the trial, had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of the defendant.

THE defendant, having been convicted on an indictment for a libel, was now brought up to receive judgment, when an affidavit made by the prosecutor was offered to be read in aggravation, wherein he swore that a Mr. *Taylor* had informed him of certain expressions made use of by the defendant to *Taylor* (being in effect repetitions of the libellous matter) since the trial. That application had been made to *Taylor* to join in the affidavit, who declined doing so, as not wishing to urge the aggravation of punishment: but when shewn, the affidavit of the prosecutor admitted the truth of the statement. This was at-

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ttempted to be supported on the authority of *The King v. Archer* (a); and the practice since that determination.

Gibbs objected to the reading of such an affidavit: and questioned the propriety of that determination, as contrary to the established rule, that hearsay is no evidence. It was in effect calling on the defendant to answer a charge not made upon oath; for it might be true that *Taylor* told the prosecutor that the defendant had uttered the libellous expressions, and yet it might not be true that the defendant had so said; and thus the defendant might be prejudiced by the imputation of a fact, for which, if false, no person could be indicted for perjury. It was clear that this would not be evidence against the defendant at the trial; then why should it be evidence against him when brought up to receive judgment? Admitting, however, that the defendant was allowed time to answer and deny the charge if he could, yet as he must be committed in the mean time, the effect of punishment was answered, though he might afterwards be able to clear himself. In all other cases it happened that the adverse parties were at issue on the material facts; but here the defendant could not deny that the third person gave the information sworn to, but only that he himself did not say what was imputed. At any rate, he observed, that this was so far distinguishable from *Archer's* case, that there, the party refusing to make the affidavit, whose information was admitted on hearsay, was at least sworn to be under the influence of the defendant, which was not stated in this affidavit.

Erskine, on the other hand, relied on the authority of *Archer's* case, which had been continually acted upon in practice ever since. Whatever the rule was, it would be equally favourable to the defendant as to the prosecutor: it was open to the former to make the like affidavit of what had been said by the prosecutor to a third person, which went in destruction of the prosecution or mitigation of punishment. He admitted that the defendant might receive a prejudice in the manner stated from such an affidavit, although ultimately no person could be indicted for perjury; but this objection, he observed, applied as well to every case where the conversation deposed to only passed in the presence of the party deposing.

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(a) 2 Term Rep. 203. n.: & vide *Kel.* 55. pl. 5. & *Rex v. Jolliffe*, 4 Term Rep. 226. & *Rex v. Wilson*, ib. 438.

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LORD ELLENBOROUGH, C. J. Without entering into the merits of the determination in *The King v. Archer*,* which I am not prepared to say that I should have concurred in at the time, it is enough to observe, that this is clearly distinguishable from that case; because it is not here sworn that *Taylor* was under the control or influence of the defendant.

GROSE, J. The precedent of *The King v. Archer* ought not to be carried further than that case.

All the Court concurred in rejecting the affidavit.

Friday,
May 28th.

TRIER against BRIDGMAN.

Bail in error are not required by stat. 3 Jac. 1. on error brought on a judgment by default in debt on a count for a promissory note, any more than on counts for goods sold and delivered, and on an account stated; though if there were one count, on which judgment was entered up, for which bail in error were not required, it seems sufficient to excuse the plaintiff in error.

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BEVAN obtained a rule *nisi* for staying proceedings pending a writ of error, upon a judgment by default, in an action of debt on a promissory note, and for goods sold and delivered, and upon a *quantum valebant*, and upon an *insimul computassent*.

Espinasse shewed for cause, that no bail in error had been put in, as required by stat. 3 Jac. 1. c. 8. in actions of debt upon any contract; the promissory note being, he said, a contract for a sum certain and payable at a certain time; and therefore distinguishable from the case of *Ablett v. Ellis (a)*, where the counts were only for work and labour, goods sold and delivered, money had and received, and on an account stated.

LORD ELLENBOROUGH, C. J. At the time of passing the stat. 3 Jac. no such action of debt could be maintained* on a promissory note: it might have been evidence of a debt, but it did not constitute a debt *per se*. The stat. 3 & 4 Ann. c. 9, first gave an action upon such an instrument; before which, neither the payee nor indorsee could have sued the maker upon the note. And if there be one count in the declaration on which judgment is entered up, on a cause of action for which debt would not lie at the time of the stat. of *James*, no bail in error is required.

Bevan, in support of the rule, referred to *Alexander v. Biss (b)*, and *Girlin v. Baker (c)*, to shew that bail in error could not be demanded upon the other common counts.

(a) 1 Bos. & Pull. 249.

(c) *Yelv.* 227. 2 Bulstr. 53. S. C.

(b) 7 Term Rep. 449.

Lord ELLENBOROUGH, C. J. then observed, that as it appeared upon the authority of those cases, that bail in error was not necessary, either on the counts for goods sold and delivered, or upon the *insimul computassent*, there was no one count in the declaration on which it could be required.

Per Curiam,

Rule absolute (a).

(a) Vide *Bidleston v. Whytel*, 3 Burr. 1545.

The KING *against* CATOR.

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Monday,
May 30th.

THE defendant having been convicted of writing and publishing a libel in certain letters to Mr. *Jackson*, was brought up this day in custody, to receive the judgment of the Court: who thereupon sentenced him to pay a fine of 200*l.* to the King. After which

Adam moved, on behalf of the defendant, that the Court would direct that the original letters, which had been proved at the trial, might be delivered up by the prosecutor, and deposited with the officer of the Court.

Garrow for the prosecution, after noticing the singularity of the attempt, said that the prosecutor, having received previous intimation of such a motion being intended to be made, had furnished him with the original letters, which he then had in Court, ready to obey whatever order the Court might think proper to make. But

Grose, J. (in the absence of Lord *Ellenborough*), after consulting with the other Judges present, said that the motion was unprecedented, and not fit to be entertained; and therefore they should not make any order upon the subject; and he even doubted whether they had now any authority to make such an order on the prosecutor, who was out of Court.

After judgment on the defendant for a libel, the Court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the Court.

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Monday.
May 31st.

The KING against STEVENTON and Others.

1. The stat. 26 G. 3. c. 77. s. 13. which enacts that no person shall prosecute any "action, bill, plaint, or information, in any of the King's Courts," for the recovery of any Excise penalty, &c. unless prosecuted by the Attorney-General, or some revenue officer, is confined to the superior Courts of record; and therefore an information for removing wax candles from the

AN information was filed by the Attorney-General against the defendant, stating, That on the 2d of *December* 1800, at the chief office of Excise in *London*, (to wit) at, &c. *W. Pilkington* gentleman, as well for the King as for himself, exhibited before the commissioners of the Excise a complaint and information, and thereby informed the said commissioners that within three months then last past, (and within the limits and jurisdiction of the said office of commissioners) to wit, on the 25th of *October* then last past, at the parish of *St. Martin in the Fields*, in the county of *Middlesex*, one *William Forge* did knowingly receive, and then and there had in his custody and possession a large quantity, to wit, 1494 lb. of candles, to wit, wax candles of a large value, to wit, of the value of 250*l.*; after the said wax candles had been removed from the * place where the same were manufactured, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties to which the same were liable had been charged, or before the said wax candles had been lawfully condemned as forfeited, contrary to the form of the statute, &c. whereby and

place of manufactory before the duty paid (by s. 10. of the same statute), may be prosecuted before the commissioners of Excise, by one not averred to be such officer. 2. And the information stating in effect that the candles were home-made candles seem to be sufficient, without expressly naming them *British* candles; the words of the Act being "*British* spirits, soap, and candles;" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of Excise on such prior information, which is only stated by way of recital in the information for the conspiracy. 3. The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condemnation as well as prior payment of the duty before removal; though that seems proper enough. 4. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. 5. Neither is it necessary, at least in such collateral proceeding, to recite that the original information was presented before the commissioners by name, though it be not averred to have been before three or more, of them, according to stat. 1 *Geo.* 2. *st.* 2. c. 16. 6. Neither is it necessary in reciting such prior information averred to have been made within three months after the offence committed, according to stat. 1 *W. & M.* c. 54. s. 13. also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute. 7. Where the stat. 7 & 8 *W.* 3. c. 30. s. 24. enables the commissioners of Excise to summon witnesses before them, upon a charge exhibited against another for an offence against the Excise laws, and an information in a collateral proceeding recited such summons to have been duly made, proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of the latter without any special directions from the board is sufficient, although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the Excise.

by force of the said statute, the said *W. Forge* had forfeited and lost the said wax candles, and also treble the value thereof; and thereupon the said *W. P.* prayed judgment of the same commissioners in the premises, and that he might have one moiety of the said forfeitures according to the form of the statute, &c.; and that the said *W. Forge* might be summoned to answer the said premises, and to make defence thereto before the said commissioners. It then stated, that the said commissioners afterwards, and whilst the said information was depending and undetermined, to wit, on the 22d of *January*, 1801, at the said chief office of Excise in *London* aforesaid, to wit, at, &c. caused to be issued their summons in writing to one *Edward Baythorne*, who then and there was a material witness on the part of the said *W. P.* touching the matters, &c. thereby requiring the said *E. B.* personally to be and appear before the said commissioners, &c. at the chief office, &c. on, &c. then and there to give evidence, &c. in the cause depending between the said *W. P.* informer, and the said *W. F.* defendant, which summons afterwards, to wit, on, &c. at, &c. was in due form of law served on the said *E. B.* It then charged, that the defendants *W. Forge*, *Anthony Steventon*, attorney at law, and *Joseph Vicars*, well knowing the premises, but unlawfully, &c. intending to obstruct the due course of justice, and to deprive the said *W. P.* of the benefit of the evidence of the said *E. B.* touching the matters, &c. on, &c. (and before the said information came on to be heard and determined) with force and arms at, &c. unlawfully, &c. did conspire to persuade and prevent the said *E. B.* from appearing and attending the said commissioners of the said chief office in *London*, according to the exigency of the said summons, and from giving his evidence touching the matters specified in the said information there; and in pursuance of the said conspiracy, &c. he did solicit the said *E. B.* not to appear before the said commissioners, &c. to give evidence, &c.; and in pursuance of the said conspiracy, &c. on, &c. at, &c. did pretend and affirm to the said *E. B.* that the sum of 10*l.* would exonerate him the said *E. B.* from any trouble or expence he could be put to by reason of his not appearing before the said commissioners to give evidence, &c.; and that they would exonerate him, &c.; by reason of which said premises the said *E. B.* did not attend to give evidence before the said commissioners at the chief office of Excise in *London*, according to the exigency of the said summons,

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mons, as by law he ought to have done, to the manifest obstruction and hindrance of justice, &c. There was another count not materially different from the first. The defendants pleaded not guilty.

After conviction before Lord *Kenyon*, C. J. at the Sittings after last *Trinity* Term,

Erskine and *Gurney* in *Michaelmas* Term last moved for a new trial, and also in arrest of judgment.

[365] The grounds of the motion for a new trial were these: That whereas the foundation of the offence imputed to these defendants arose out of a proceeding before the Commissioners of Excise, it was incumbent on the prosecutor to prove according to the allegations in the count, that the original information was *duly* exhibited before such commissioners, and that the summons issued by them to *E. Baythorne* the witness, was a legal summons. The stat. 7 & 8 W. 3. c. 30. s. 24. enacts, "That the commissioners of Excise and justices of the peace "respectively, upon any information exhibited before them for "any offence committed against the laws of Excise, may summon any person (other than the party accused) to appear before them at a certain day, time, and place, to be inserted in "such summons, and to give evidence," &c. This is a personal authority given to the commissioners and magistrates to be exercised by themselves, and cannot be deputed by them to others. But the summons proved at the trial was a printed form, not signed by any of the commissioners, nor even by Mr. *Mayhew* the Solicitor of the Excise (supposing, which they denied, that the commissioners could devolve their authority on him) but merely with the name of *Mayhew* printed at the bottom; which forms of summons it appeared were distributed to inferior agents in the country. The summons in question issued out of Mr. *Mayhew's* office; but no evidence was given that it had been issued by his special direction in the present instance. It was also objected that the commissioners should have signed the information, as well as the summons, in order to denote their sanction of it. But this last objection was never pressed again. As to the other,

Lord KENYON, C. J. in reporting Mr. *Mayhew's* evidence, said, that the form of the information before the commissioners, and that of the summons as proved by him at the trial, were such as had at all times been used within the witness's remembrance

brance above 30 years, and such as he found, on inspection, had been used before his time.

The defendant's counsel insisted much on the illegality of such a practice, which they said no usage could legalize. That many Acts of Parliament gave justices of peace a power to issue summonses, as in the instance in question; and it never was conceived that they could delegate such authority to be exercised by another; but that every such summons had the signature of the magistrate in whose name it was issued. That the same clause (24) of the stat. 7 & 8 *W. c.* 24, gave a forfeiture against the party neglecting to comply with the summons, which strengthened the necessity of a strict construction of the power. That such powers delegated to inferior agents, without a responsibility, would be liable to great abuse and oppression of the subject. And the stat. 1 *Geo.* 2. *st.* 2. *c.* 16. *s.* 4 and 5, seems to consider otherwise by directing that all warrants, &c. issued by the commissioners in execution of their adjudications, should be under the hands and seals of three of them, though they be not the same by whom the adjudication was made. And they referred to *Burslem v. Fern* (a), to shew that the filling up a sheriff's warrant on a *capias ad respondendum*, after it had been signed, sealed, and issued by the sheriff, made it void.

The *Attorney-General* contrà was stopped by the Court.

LORD KENYON, C. J. The Court ought not to suffer the question to be agitated, Whether a summons which has issued from these commissioners in the usual course of office, according to their constant practice, and in conformity with the practice of superior Courts, is not regular? Subpœnas are constantly issued in this manner; they are sent down in blank into the country, and there filled up; and in the same manner are jurors summoned by the sheriff to attend the assizes, without his signature to the process. I am afraid of shaking the practice of all the Courts and judicial officers in the kingdom. As to justices of peace, I will take for granted that they always sign the summonses issued by them, as they have been used to do.

GROSE, J. To shew how far custom will bind in these matters, there is no other authority than that for trying prisoners at the *Old Bailey* for *Middlesex*, as well as *London*.

Per Curiam,

Rule for a new Trial discharged.

(a) 2 *Wils.* 47.

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The defendant's counsel then took several objections, in arrest of judgment:—1. The stat. 26 Geo. 3. c. 77. s. 13. enacts, "That it shall not be lawful for any person whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, &c. any action, bill, plaint, or *information*, in *any of his Majesty's Courts*, against any person, for the recovery of any fine, penalty, or forfeiture, incurred by virtue of any Act or Acts now in force or hereafter to be made relating to the revenues of Customs or Excise, unless the same be commenced, &c. in the name of the Attorney-General, or of some officer of some or one of his Majesty's said revenues." And all other proceedings in that respect are thereby declared to be null and void. It was contended that the commissioners of Excise were constituted *a Court*, for the purpose of hearing and determining complaints relative to that branch of the revenue; and therefore that no information could, by the express provisions of the statute, be instituted before them, except by the Attorney-General, or one of the revenue officers; and *William Pilkington* not being averred to be of the latter description, the whole proceeding was *coram non judice*, and consequently it was no offence in the defendants to have prevented any person from appearing as a witness before them. That the occasion of making such provision was, that before that time offenders against the Excise laws fraudulently procured their friends to commence prosecutions against them, which were afterwards faintly and insufficiently carried on; in consequence of which the offenders either wholly escaped punishment, or received less than they deserved. This was provided for as to informations, &c. in the superior Courts of *Westminster* and *Edinburgh*, by the stat. 12 Geo. 1. c. 28. s. 28, which expressly mentions those courts. Then the only reason for making the provision in question in more general words in the stat. 26 Geo. 3. c. 77. s. 13, was to include other Courts than such superior Courts; and the expression, "*any of his Majesty's Courts*," evinced such an intention; otherwise the latter statute was nugatory. It could not be supposed that the Legislature only meant to suppress such frauds in the superior Courts of *Westminster*, and to leave them still open to be practised before the inferior tribunals, where it was probable the greater mischief lay. That where the superior Courts of *Westminster* were alone intended in an Act of Parliament, they were always either so named, or at least under

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der the general designation of *The Courts of Record*; that being considered as an appropriate technical description by way of excellence: but the words here used, viz. “*any of his Majesty’s Courts*” were of much larger signification, especially when applied to the subject-matter, when it is considered that by far the greatest number of Excise prosecutions are instituted before the commissioners and the justices of the peace, and not in the Court of Exchequer. But even supposing the word “*Courts*” must be taken to mean “*Courts of record*,” yet that the Court of the commissioners of Excise was a Court of record, as appears from the stat. 1 *Geo. 2. st. 2. c. 16. s. 4*, which speaks of the *record* of their proceedings, and also from general reasoning and legal analogies. Thus Lord Coke (*a*) speaks of *the Court* of the commissioners of sewers: but their jurisdiction is by no means so extensive as that of the commissioners of Excise, nor of such general and public importance (*b*). That power of fine and imprisonment was given to commissioners of Excise by some of the early revenue acts, which alone would constitute them a Court of record. *Griesley’s case* (*c*), *Denbawd’s case* (*d*), *Godfrey’s case* (*e*), *Dr. Grenville v. The College of Physicians* (*f*) and 3 *Blac. Com.* 24.

Lawrence, J. observed, that Lord *Holt’s* position in the case of the College of Physicians, that a power to fine and imprison makes a Court or judge of record, was said by Lord C. J. *De Grey* in 2 *Blac. Rep.* 1146, not to be generally and universally true.

At any rate, it is sufficient if the commissioners are *a Court*, whether of record or not: and by Lord *Kenyon* in *Darby v. Baughan* (*g*), “commissioners of bankrupt are a Court of justice,” though they are no Court of record.

2. Previous to the stat. 1 *Geo. 2. st. 2. c. 16*, all complaints and informations at the chief office of Excise in *London* were to be heard and determined by all or the major part of the commis-

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(*a*) 4 *Inst.* 275.

(*b*) In answer to an inquiry directed by the Court to be made during one of the intervals of discussion of this case, it appeared to be the practice of the commissioners of Excise not to receive informations of this sort from any other than their officers; and *Pilkington* was of this description; but it also appeared that such informations contained no averment that the informer was an officer.

(*c*) 8 *Co.* 53.

(*d*) 10 *Co.* 103.

(*e*) 11 *Co.* 43.

(*f*) 12 *Mod.* 388.

(*g*) 5 *Term Rep.* 210.

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sioners. Sect. 4. of that statute recites the inconvenience and delay of requiring so many commissioners to attend, and enacts that all such complaints and informations may be heard and determined by any three or more of them; "and that it shall be sufficient in the written account or record of such proceedings, to mention that such complaint or information was made and exhibited to and before three of such commissioners, without particularly mentioning their names, &c. and that every such adjudication and determination of such three or more commissioners, &c. shall be as good and valid in law, and of the same force and effect, &c. as if made by all or the majority," &c. Here then if the information had been averred to have been made before three of the commissioners, it would not have been necessary to have set forth their names; but being only alleged to have been made before the commissioners generally (which words would be satisfied if *two* only were present) their names ought to have been mentioned by the very admission of the Legislature.

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3. The information alleged to have been made by *Pilkington*, which is the foundation of the subsequent proceeding, exhibits no legal cause of complaint, of which the commissioners had jurisdiction to inquire: for it is founded on stat. *Geo. 3. c. 77. s. 10.* which enacts, "That if any person shall knowingly receive, buy or have in possession any *British* spirits, soap, or candles, after the same shall be removed from the respective places where the same were made or manufactured, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties, &c. have been charged or before such *British* spirits, soap, or candles, have been lawfully condemned as forfeited, the offender, &c. shall forfeit the same, &c. and treble the value." Hereby two distinct offences are constituted; the one, the knowingly having in possession, &c. such candles, &c. after the removal from the place of manufactory before the duties paid; the other, the like having in possession in any place after such removal, before condemnation, without payment of the duties. Upon the face of this information it is left uncertain which of these offences was meant to be charged by the first information recited.

Lawrence, J. The effect of the recital of the former information is to aver, that neither the duty was paid, nor the candles condemned, before the removal from the place where the duty was payable.

4. The

4. The word *British* applies as well to *candles* as to *spirits*; and therefore the candles charged to be in *Forge's* possession, &c. should have been averred to be *British*. This is the more material, because foreign candles may be imported on payment of a certain duty, to which the regulation of the statute on which the original information was founded could not apply.

Lawrence, J. observed, that the charge in the information following the words of the statute was, that *Forge* knowingly had such candles in his possession after they had been removed from the place of manufactory, *and where the same ought to have been charged with the duties payable in respect thereof*, before the said duties, *to which the same were liable*, had been charged; which shewed that the charge could only apply to the removal of home-made candles.

5. The stat. 1 *W. & M. c. 54. s. 13. (a)*, which limits the information before the commissioners to three months after the offence, also requires notice to be given to the defendant within a week after the information laid; which notice was as necessary to be averred here, as that the original information was within three months, which is stated.

6. It is not stated that issue was joined between the Crown and the defendant in the first information recited (*b*).

The *Attorney-General, Mingay, Garrow, and Wood*, contrà, insisted as to the 1st objection, that the stat. 26 *Geo. 3. c. 77. s. 13.* which mentioned any of the King's Courts, was confined to the superior Courts; for which they went at large into an examination of the body of statutes passed in *pari materia*; which it is not necessary to state, as this, which was the principal objection, afterwards received a full answer from the Court. And they referred to *Gregory's case*, 6 *Co. 19 b. Moor, 421. Dy. 236, a.* and *W. Jones*, 193. that where a statute gives a remedy in any Court of record (and "any of his Majesty's Courts" must be so intended) it must be understood of the superior Courts of *Westminster*; and particularly in the present case, with reference to the stat. 12 *Geo. 1. c. 28. s. 28.* passed in *pari materia*.

2. The stat. 1 *Geo. 2. st. 2. c. 16. s. 4.* only relates to adjudi-

(a) The particular statute is applicable to another subject of Excise, but general reference is made to it by s. 19. of 26 *Geo. 3. c. 77.*

(b) The two last, and some other trifling objections, were urged by one of the defendants.

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cations,

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cations, where the commissioners have proceeded to hear and determine; but here the matter was not heard and determined, but only a summons had issued to a witness to put the matter in train. At any rate, it is no more than a question concerning the regularity of process, which cannot be entered into in this collateral proceeding. Whether or not the commissioners have proceeded erroneously in a matter in which it must be admitted they had general jurisdiction, it was still an offence at common law in the defendants to *conspire* to interrupt their proceedings, and to suppress the truth, by keeping back a necessary witness. It would be no less an offence to conspire to present an erroneous indictment for any offence against an innocent person; and an action for a malicious prosecution would lie notwithstanding such error. But the commissioners having jurisdiction to inquire of the original offence, the Court would presume that they proceeded regularly, unless the contrary appear.

* 3. The fact of removal before the payment of the duties is averred, and the only excuse the party could have, which was that the candles had been before condemned, is negatived; therefore there is no uncertainty in the charge.

4. The word *British* is confined to *spirits*, as contra-distinguished from *foreign* spirits, mentioned in the antecedent clause, and extends not to *candles* or *soap*; though the Act also supposes these latter to be home-made, because it speaks of their removal from the place of manufacture before the duties paid; and so the charge in the information supposes the candles to be home-made; but even if that were matter of error or appeal upon the original information, it is no objection to the present information for a conspiracy.

[374] 5. The service of process on such offender is never required to be stated in an information for a collateral offence arising out of it. The Act is merely directory to the commissioners how to proceed. Neither could it be stated here; because the time was not arrived for stating such notice when the present offence was committed.

6. No issue is joined in summary proceedings, as in the common law Courts; but the party is summoned to appear, and after hearing the charge, is asked, *ore temus*, what defence he has to make.

Curia advisare vult.

GROSE,

GROSE, J. (a) now delivered the judgment of the Court. This was a motion in arrest of judgment upon an information, not necessary to be re-stated; and the principal question agitated was, Whether the stat. 26 *Geo. 3. c. 77. s. 13.* extends to proceedings before the commissioners of Excise and justices of the peace? not whether they fall within the legal definition of a *Court*? but whether the Legislature in this clause meant to comprehend them? To shew that they were not meant to be comprehended, it is a circumstance of some weight, that in no Act of Parliament which has been produced by the defendant are they so described: and upon looking through the several Acts, it is clear that they were intended not to be comprehended. By the stat. 12 *Cha. 2. c. 23. s. 31*, all forfeitures and offences against that Act, within the limits of the chief office in *London*, were to be heard by the commissioners of Excise; and all forfeitures and offences elsewhere were to be heard and determined by two or more justices of the peace, with an appeal to the quarter sessions. By the stat. 15 *Cha. 2. c. 11*, certain penalties are to be recovered before two justices; and (by s. 25.) all fines, penalties, and forfeitures, for which no remedy was ordained by that Act, shall be recovered by action of debt, bill, plaint, or information, in any Court of record. From this time there were different offences: some of which were to be punished by proceedings before justices; others by action of debt, bill, plaint, or information in any of his Majesty's Courts of record; and some by subsequent statutes by either mode. The stat. 12 *Geo. 1.* is confined to *informations*, and did not extend to *actions*; and the defect in that Act was in this respect, and not in its being confined to the Courts of *Westminster* and *Edinburgh*. To remedy this, the stat. 26 *Geo. 3. c. 77*, extended the provisions of the stat. 12 *Geo. 1.* to all the ways by which fines, penalties, and forfeitures imposed by the Excise laws could be recovered in the superior Courts; and the words "action, bill, and plaint" are not inoperative, as was argued: nor are the proceedings against offenders against the Excise laws merely *in rem*, as was supposed. For many statutes authorize proceedings by action to recover penalties under the Excise laws. The stat. 15 *Cha. 2.* authorizes the recovery by action of debt, bill, plaint, or information, in any

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(a) Lord *Ellenborough* was Attorney-General when the case was argued.

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Court of record of fines, penalties, and forfeitures, for the recovering which no other remedy is given. The stat. 1 *Will.* and *Mary*, c. 24. s. 17, gives penalties against brewers of 100*l.*, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of record. The stat. 10 & 11 *W. & M.* c. 24. s. 20, gives the like. So the stat. 18 *Geo.* 2. c. 26. s. 4. and 24 *Geo.* 2. c. 40. s. 29.: all these statutes using the same words as the stat. 26 *Geo.* 2. "action, bill, plaint, and "information," speak of Courts of record. Therefore the clause in the stat. 26 *Geo.* 3. which must be meant to restrain the power given by former statutes, must be understood to refer to the Courts mentioned in those statutes. The statutes are all *in pari materia*. The true import of the word "information" *noscitur a sociis*. The above was the only objection which seemed to be relied upon: As to the rest, they were very satisfactorily answered at the Bar. For these reasons we are of opinion that the judgment ought to stand.

Rule discharged,

Friday,
 May 14th.

DOE dem. GEORGE ALLAN, JOHN PEASE, and THOMAS PEASE,
 against JOHN CALVERT.

Under a power in a will to lease in possession and not in reversion, a lease for years executed the 29th of March to the then tenant in possession, *habendum* as to the arable from the 13th of February preceding, and as to the pasture from the 5th of April then next, &c. under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January, and 10th of April, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power.

IN ejectment for certain lands in *Yorkshire*, a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on the following case:

Mrs. *Anne Allan*, being seised in fee of the lands in question, by her will dated the 28th *January*, 1783, duly executed and attested, devised the same to the use of *James Allan* the Elder for life, remainder to *George Allan* the Elder for life, remainder to trustees to preserve contingent remainders, remainder to *George Allan* the Younger (the lessor of the plaintiff), and his assigns for life, remainder to trustees, &c. remainder to the first and other sons of *George Allan* the Younger in tail male, with remainders over. In the said *Anne Allan*'s will is contained the following proviso: "Provided always, and my will is, that it shall and may be lawful to and for the said *James Allan* the Elder, *George Allan* the Elder, and

George

George Allan the Younger, respectively, as and when they shall respectively come into and be in the actual possession* of my said hereinbefore devised estates and premises, or any part thereof, or be actually entitled to the rents and profits thereof, or of any part thereof, by indentures under their respective hands and seals to demise or lease the same, or such part or parts thereof, whereof they shall respectively be in the actual possession, or to the rents and profits whereof they shall be respectively entitled, unto any person or persons for any term or number of years not exceeding twelve years *in possession, and not in remainder, reversion, or expectancy*; so as upon every such lease there be reserved and made payable during the continuance thereof respectively the best improved yearly rent that can be reasonably had or gotten for the same, without taking any sum or sums of money or other thing by way of fine or income for or in respect of such lease or leases; and so as none of the said leases be made dispunishable of waste by any express words to be therein contained: and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved: and that such lessee or lessees, to whom such lease or leases shall be made, seal and execute counterparts of such lease or leases."

Anne Allan died in *October 1785*. Upon her death, *James Allan* the Elder entered, and died seised in *January 1790*: and the late *George Allan* the Elder, being then tenant for life in possession of the lands in question, under the devise in *Anne Allan's* will, did, by indenture of lease, bearing date and executed the 29th of *March 1798*, demise the lands in question to the defendant, to hold the same unto the said *John Calvert*, in manner following, viz. the tillage ground from the 13th of *February* last past: the pasture ground from the 5th of *April* then next, and the residue of all the premises from the 12th of *May* also then next, for the term of twelve years from the said respective days, under the neat and clear yearly rent of 85*l.* by quarterly payments, viz. upon the 10th of *July*, the 10th of *October*, the 10th of *January*, and the 10th of *April*, in every year; and the first payment to be made on the 10th of *July* then next ensuing. *George Allan* the Elder died on the 17th of *May*, 1800; and *George Allan* the Younger (lessor of the plaintiff) survived him. The periods mentioned in the *habendum*

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dum of the lease, viz. the 13th of *February*, the 5th of *April*, and the 12th of *May*, are the usual periods of entry, by tenants on arable pasture and meadow ground respectively, in the country where the lands in question lie. The rent reserved on the lease in question was the best improved yearly rent that could be reasonably gotten for the lands in question at the time the lease was granted. No fine or other thing was taken for granting it. The lessee is not made dispunishable of waste, The lease contains a clause of re-entry for non-payment of the reserved rent. And the lessee executed a counterpart of the lease. The defendant on the 29th of *March* 1798 (the day of the date of the lease in question) held the premises as tenant from year to year, to *George Allan* the Elder, as he had been to the testatrix, and to *James Allan* the Elder, in their respective lifetimes; and which tenancy, according to the custom of the country above stated, would determine on the 13th of *February*, the 5th of *April*, and the 12th of *May*, in the year 1798; and the defendant was in possession of the premises at the time of bringing the ejectment. The questions for the opinion of the Court were, 1st, Whether the lease of the 29th of *March*, 1798, by the then tenant for life *George Allan* the Elder, were a good and sufficient lease in *possession* under the power of leasing contained in Mrs. *Anne Allan's* will, so as to bind those in remainder claiming under the same will? 2d, Whether, under the circumstances, the lessors of the plaintiff, or any of them, were entitled to recover in this ejectment?

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This case was first argued in *Hilary* Term last, by *W. Walton* for the plaintiff, and *Lambe* for the defendant; and again in this Term by *Eskine* for the plaintiff, and *Park* for the defendant.

For the plaintiff it was contended, that this was a lease *in reversion*, and not *in possession*, and therefore void under the power. It was only a lease in possession as to the tillage ground, which was to be holden from the 13th of *February* preceeding the 29th of *March*, when the lease was executed. As to all the rest, part of which was to be taken from the 5th of *April*, and the residue from the 12th of *May* then next ensuing, it was clearly prospective, and therefore a lease in reversion. Then the lease being entire, if void for part, must be

be void for the whole. It was said by *Holt*, C. J. in *Winter v. Lovcdore* (a), that any lease to commence *in futuro*, was a lease in reversion, as opposed to a lease in possession; and that a lease to commence after another lease, was properly a lease in reversion. The previous occupation of the farm by the same tenant cannot make any difference: the question is the same upon the construction of the subsisting lease as if it had been made to a stranger; and if so, it is certain that he could not have taken possession of two thirds of the farm at the time of the lease granted. A notice to quit on the 29th of *March*, if given to a prior tenant under such a lease, would not have been binding. Then if the lease conveying in the terms of it a reversionary interest be void under the power to lease in possession, it cannot be made good by any consideration of the custom of the country. All powers must be strictly executed according to the form prescribed; and there is no equity allowed in construing the execution of them. *Taylor v. Horde* (b), *Earl of Darlington v. Pulteney* (c), and *Denn v. Fearnside* (d). This rule was not shaken in *Pugh v. Duke of Leeds* (e), though the application of it in the last-mentioned case might be questioned. The reversioner has a right to insist that he shall not be injured; but if the tenant for life had died immediately after executing this lease on the 29th of *March*, the first quarter's rent would not have been payable till the 10th of *July*, ten days after the expiration of the quarter. A lease consistent with the power and with the custom of the country might have been granted if it had not been executed till the 12th of *May*.

For the defendant, it was urged that the true question was, What the testatrix, who created the power, intended? which was to be collected from the whole of the instrument, and from all the circumstances to which it related: amongst others, it must be taken that she knew the custom of the country as to the course of husbandry and the manner of leasing; and she could not intend that the objects of her bounty should be restricted from leasing in so beneficial a manner as others, and as she herself had done. The expedient proposed of waiting till the 12th of *May* before the lease was granted would not have solved

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(a) 2 Salk. 537. Com. Rep. 39. 1 Ld. Raym. 267. S. C.

(b) 1 Burr. 120.

(c) Cowp. 267.

(d) Wils. 176.

(e) Cowp. 711.

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the difficulty; for as great expences must be incurred by the incoming tenant in preparing the arable land for the crop, no tenant would incur such expences before-hand at the risk of not having the lease afterwards granted to him. In *Doe d. Dogget v. Snowdon* (a), the custom of the country was holden to controul the general rule of law, as to giving six months' notice to quit before the end of the tenant's year. There, as here, the arable part of the farm was holden from *Old Candlemas-day*: yet the rent being made payable at *Old Lady-day*, a notice to quit six months before the latter was holden sufficient; the whole being considered according to the custom of the country, as a *Lady-day* taking. So this may be taken to be a substantial execution of the power according to the custom of the country; the whole rent being reserved quarterly. These powers are now construed more liberally than formerly. In *Pugh v. The Duke of Leeds* (b), where the power was to lease in possession, it was ruled that a lease *from the day of the date* should take effect either inclusively or exclusively of that day, according as it would best effectuate the intention of the person creating the power. Upon the same principle, in *Goodtitle v. Fenucan* (c), a lease *per verba de presenti* was holden to be within a like power: though at the time of the execution other lessees at will, or from year to year, were in possession of the demised premises; they receiving directions to pay the rents to the new lessee. So *Pomeroy v. Partington* (d), and *Doe d. Duke of Devonshire v. Cavendish* (e) turned entirely on the intention of the parties making the powers. At any rate the execution of a power may be good in part, so far as it is warranted by the power, though bad for the excess; as in *Alexander v. Alexander* (f) and *Commons v. Marshall* (g), therefore the lease may be valid for the arable land.

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In reply it was answered, that this was no question of an excess in executing the power, for that the lease was entire, and the rent, which was also entire, could not be apportioned; and therefore the whole was a void execution of the power. That the

(a) 2 Blackst. Rep. 1224.

(b) Cowp. 714.

(c) Doug. 565.

(d) 3 Term Rep. 665.

(e) 4 Term Rep. 741. n. Of this case *Lawrence*, J. now observed, that it was one that would not rule any other, at least not exactly similar: That he had heard Lord *Kenyon* express that opinion of it. And vide *Brudenell v. Elwes*, ante, 1 vol. 450.

(f) 2 Ves. 644.

(g) 7 Bro. P. C. 111.

case of *Doe v. Snowdon* turned upon the construction of a notice to quit, given to a tenant from year to year, which not being upon a contract under seal, might be governed by the custom of the country, in relation to which the parties might be supposed to have contracted: for which purpose the entry on the arable land was not considered as a general taking possession of it at that period, but only for a special purpose, viz. to plough and prepare for the *Lent* corn. But even that case was much questioned by Lord *Kenyon*, C. J. in an ejectment tried before him at *Stafford* summer assizes, 1788, upon the demise of Lord *Grey de Wilton* (a),

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GROSE, J. now delivered the opinion of the Court.—In this case there can be no doubt the lease granted to the defendant is a lease in reversion, inasmuch as it is dated the 29th of *March*, and is to take effect as to all the lands and other premises contained in it, except the arable, at times subsequent to the determination of an existing interest: and according to the definition in the case of *Winter v. Loveday, Comyns*, 39, leases in reversion in a power mean leases to commence after the end of a present interest in being. But it is argued for the defendant, that Mrs. *Allan*, the creator of the power in this case, must have intended, from the custom of the country, of which she was apprized, that such leases should be made as that in question. To this it may be said in answer, that it would be directly contrary to the terms of the power; which, if the custom be engrafted on it, instead of being to let leases in possession, would be to let leases in reversion, so as the commencement of the lease as to part should be carried not beyond the 5th of *April*; and as to the other part, not beyond the 12th of *May* next following the lease. The whole of the argument for a construction in favour of the defendant, is built on a supposed impossibility, that the power of leasing given by this will should be exercised, if this lease be not good. But in answer to this it may be observed, first, that in this particular case no such impossibility exists; for the defendant might have surrendered his subsisting term and taken a new lease in possession. And though the lease had been granted to a person not having a prior interest to be surrendered, still it might have been made consistent with the terms

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(a) Vide this case afterwards stated by *Grose*, J. in delivering the judgment of the Court.

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the power. For if the case of *Doe v. Snowdon* (a) be law, the interest of the tenant was that of a tenancy from year to year, ending the day on which the rent is payable in *April*, under an agreement to let the succeeding tenant prepare the arable land for corn in the month of *February*; and having under the same agreement a right to depasture the meadow till the 12th of *May*; under which circumstances a lease in possession might have been made, had the tenant for life waited till the 5th of *April*. The case of *Doe on the demise of Lord Grey de Wilton*, at *Stafford* summer assizes, 1788, was cited at the Bar as a case in which *Doe v. Snowdon* had been overruled by Lord *Kenyon* at *nisi prius*. That was an ejectment brought by a landlord on a notice to quit. The defendant held a farm, as to the arable lands from *Candlemas*, as to the buildings and pastures from *May-day*; the rent payable at *Michaelmas* and *Lady-day*. The notice to quit was given six months before *May-day*, but not six months before *Candlemas*. Lord *Kenyon* nonsuited the plaintiff; and is stated to have said that the notice must be given half a year before *Candlemas*. But it does not appear whether the notice to quit were given half a year before *Lady-day* or not so, as to bring it within the rule laid down in *Doe v. Snowdon*. But it does not appear to us necessary, in deciding the present case, to determine between the cases of *Doe v. Snowdon* and that of *Doe d. Lord Grey de Wilton*; because, supposing half a year's notice to quit previous to the earliest time of entering on any of the lands to be requisite, in order to maintain an ejectment, it will not necessarily follow that a lease made previous to the last rent-day of the subsisting lease, and also previous to the time of possession being to be obtained of a great part of the farm, will not be a lease in reversion. But be that as it may, at all events a concurrent lease might have been granted according to the case of *Goodtitle v. Fumican*, *Dougl.* 565, for twelve years immediately commencing, *habendum* from the 13th *February*, the 5th *April*, and the 12th of *May* in the preceding year: this would have fallen within the terms of the power, which is to demise or lease for any term or number of years not exceeding twelve years, in possession, and not in reversion; for such lease would have been in possession, and not in reversion, remainder, or expectancy, and would have been for a term not exceeding twelve years; which is the restriction mentioned in the power. And it is not

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to be taken that this would not be an execution of the power to the utmost extent Mrs. *Allan* intended; for if a lease may be made not contradictory to the terms of the power, and consistent with the custom of the country, such lease shall be intended to be what was meant (if by a surrender a lease in possession, conveying a future interest for twelve years, could not be granted) rather than a lease contrary to the words of the power. The cases cited, where the leases have been holden void for excess only, do not apply; for this is no question of excess: in those cases, by retrenching the excess, a lease may be brought within the terms of the power; but no limitation of the term will make a lease in reversion a lease in possession.

Postea to the plaintiff.

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THIS was an action on a policy of insurance, declared to be made by the plaintiff as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, on the ship *Hoop*, valued at 1460*l.* and goods on board, lost or not lost, at and from *Elsineur* to *Ferrol*, *Cadiz*, and *Carthage*, warranted to depart with convoy for the voyage, &c. The policy was in the usual form; and the declaration contained these, together with other usual averments: that the plaintiff * was the person who gave the order to the agent immediately employed to effect the policy; that the said ship *Hoop* was not at the time of effecting the policy, nor of the happening of the loss after-mentioned, nor at any other time, *the property of or belonging to the King or any of his subjects*; and that in the course of her voyage she arrived and anchored in *Plymouth Sound*, and was there arrested and detained by order of his Majesty, and thereby prevented from pursuing her intended voyage, and was afterwards condemned as lawful prize in the High Court of Admiralty, whereby the same ship became wholly lost to the plaintiff, and to every other person to whom the same did or might appertain. There was a second count with the same averments, only stating that the vessel in the course of her voyage was taken as prize by persons unknown. There were also the common money counts. To the first and second counts there was a demurrer, alleging for causes that it was not alleged,

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A declaration on a policy of insurance on a foreign ship need not aver any interest in the assured; though there be no such words as "interest or no interest" in the policy.

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nor did therein appear, for whose use or benefit, or on whose account the policy was made; nor to whom the said ship appertained in part or in all; “nor what person or persons were interested or concerned in the said insurance, &c.; nor that the plaintiff, or any other person or persons had any interest, property, or concern in the ship: and also for that it is alleged, that the said ship became wholly lost to the plaintiff and to every other person to whom the same did or might appertain in part or in all; but it was not alleged, nor did appear with sufficient certainty to whom or to what other person or persons besides the plaintiff the said ship became wholly lost, &c.” Joinder in demurrer.

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This case was first argued in *Easter Term* last, by *Giles* in support of the demurrer, and *Puller* contra; and again in this Term by *Erskine* for the demurrer, and *Park* contra. It is unnecessary to enter at length into the argument, or the authorities referred to, as they were so fully considered by the Court in giving judgment.

In support of the causes of demurrer assigned: though it was not denied that even if the plaintiff had had no interest in the subject-matter, it would have been competent to him, as agent for a foreigner, to have effected the policy, notwithstanding the general provision of the stat. 19 *Geo.* 2. c. 37. which is confined to insurances on ships, &c. belonging to the King or any of his subjects: and that it would also have been competent to him to have laid a wager on the event of the ship's safe arrival without any interest in the property: yet it was contended that a policy of insurance, in the very terms as well as principle of it, if not otherwise expressed, imported a contract of indemnity, and therefore necessarily supposed an interest in the party for whose benefit it was made: for he could not be assured, unless he had some interest at stake, and such upon which the perils insured against might operate. Then if that were the understanding of the parties to the contract, such interest ought to be averred. That it was a deception upon the underwriter if the assured had no interest, because it varied the risk very materially: for if it were known beforehand to an underwriter that he was contracting a mere wager with the party, he would necessarily require a higher premium: because every loss in that event must be a total loss, as there could be no abandonment, and he could have no benefit of salvage, which in the case of a genuine marine insurance

surance diminished the risk. Besides which, in the case of a
 * mere wager, the assured so far from having any interest in the
 preservation of the ship, in its efficiency to perform the voyage,
 or in the ability or integrity of those employed in the navigation;
 for ascertaining all which the underwriter gives him credit, that
 he is rather interested in insuring the most desperate risks;
 against which the underwriter ought to have due warning, that
 he may apportion the premium accordingly.

On the other hand, it was denied that contracts of insurance
 were always to be considered as contracts of indemnity: for that
 a wager policy was recognized to be lawful before the stat.
 19 Geo. 2. c. 37, and was admitted to be so still with regard to
 foreigners. And that if wagers in general were lawful, though
 the parties had no interest in the event, there was no reason why
 they should not be made in form of a policy as well as in any
 other form, unless restrained by some positive law. As to the
 risk being altered, it was competent to the underwriter in every
 case, and an essential part of his business, to make inquiry as to
 every circumstance which could operate on the extent of the risk.
 That if the policy had been made "interest or no interest," or
 with words to that effect (which it was admitted would have been
 sufficient) no more intelligence would have been conveyed to the
 underwriter on the face of the policy than here; and no injury
 could ensue to him from the omission of the averment of interest
 contended for; because if the policy imported an interest, the
 plaintiff would be bound to prove one at the trial, whether ex-
 pressly averred or not: and if it did not so import, then such
 averment was not necessary: neither did the stat. 19 Geo. 2.
 impose any restraint in declaring on policies on foreign ships.
 They also referred to many precedents of declarations before the
 statute; and insisted that this very point was determined in
Crawford v. Hunter (a), where the fourth count of the decla-
 ration was the same as the present; and no writ of error was
 brought.

In reply it was observed, that in *Crawford v. Hunter* an in-
 terest was averred in the first count; and the principal question
 being, Whether the plaintiff had an insurable interest, it was
 not thought worth while to prosecute a writ of error in that par-
 ticular action merely for the defect of the fourth count: but in
Crawford v. Lusignan, on the same policy (where a writ of error

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(a) Term Rep. 13. where all the cases on the subject are collected.

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was brought) the plaintiff only took his judgment on the counts averring an interest.

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GROSE, J. (*a*) now delivered the opinion of the Court.—The question in this case is, Whether in a declaration on a policy, which on the face of it has no words to shew it not to be an interest policy, it be required that the plaintiff should aver an interest to be entitled to recover? In the course of the argument it was admitted that the vessel, being foreign, was the subject of insurance, whether the assured had an interest in it or not; and it does not seem that an underwriter is likely to suffer any inconvenience from that not being expressed in the policy; inasmuch as at the time of the subscription he may be informed whether the ship be or be not a foreign vessel: and whether the assured have an interest or not: and if he have such interest, the underwriter will be entitled to all the advantages arising therefrom, according to the case of *Le Pyper v. Farr*, 2 Vern. 716, whatever may be the form of the policy. The argument for the defendant turns upon a criticism upon the word *assured*, and upon confining that word to its original and proper meaning, and not allowing it to be understood in a looser and less proper sense, which it has acquired. That the word *assured* may be understood to import a contract to pay a certain sum on the happening of the events specified in a policy, without any regard to interest, seems to follow from what was not denied by the defendant's counsel, viz. That the plaintiff might have recovered, had the policy used the words "interest or no interest;" in which case, unless a sense be given to the word *assured* different from its proper meaning, there would be a contradiction in terms; for it would be a contract to indemnify a man against risks; by which, on the face of the instrument, it would appear he could not be damaged: and to make such contract intelligible, the words "interest or no interest," must be understood as pointing out that the word *assured* was not to be understood in its original and proper sense. In making the stat. 19 Geo. 2, the Legislature must have understood that the word *assured* had an improper as well as a proper meaning, by its prohibiting *assurances*, "interest or no interest," which is a very different thing from an insurance, "without further proof of interest than the policy," which is also mentioned in the statute: for the latter is an admission of

(a) Lord *Ellenborough*, having been concerned in the cause, gave no opinion.
interest

interest to the amount of the sum in the policy, and is consistent with the proper sense of the word *assured*; and not like an assurance without interest, which in the strict sense would be a contradiction in terms. The stat. 14 *Geo. 3. c. 48*, also treats the word *insurance* as having this less proper sense. Its title is, “an Act for regulating insurances on lives, and for prohibiting such insurance, except in cases where persons insuring shall have an interest in the life or death of the persons insured :” and its preamble recites, that the making *insurances on lives*, or other events, *wherein the insured shall have no interest*, hath introduced a mischievous kind of gaming; and then the statute enacts, that no *insurance* shall be made on any event wherein the person on whose account such policies shall be made shall have no interest. Here the Legislature treats *insurance* as a thing which may exist without an interest; but if, according to the defendant’s argument, that could not be, the Act should have been against wagering under the form or pretence of insuring; and should have enacted, that no agreement of the parties to dispense with the proof of interest, or admission of interest, if it could be shewn not to exist, should enable the person so contracting to recover. In *Roebuck v. Hammerton*, *Cowper* 737, a wager was laid on the sex of the Chevalier *D’Eon*; and the form of the contract was this: In consideration of thirty-five guineas for 100*l*, received of Messrs. *Roebuck and Vaughan*, we, whose names are hereunto subscribed, do severally promise to pay the sums of money which we have hereunto subscribed, on the following condition, viz. In case the Chevalier *D’Eon* should hereafter prove to be a female. Valued at the sum insured, without farther proof of interest than this policy. In witness whereof, we the assurers have subscribed our names. And it was contended that the stat. 14 *Geo. 3. c. 48*, did not extend to that case: that it was no policy: that the subject-matter was not capable of insurance: that the nature of the Act, and not the form of the instrument, ought to decide: and that it was a mere wager reduced into writing. But the Court held it within the Act as a *policy of insurance*. If then the insurance in the case before us, may be taken to be an insurance without interest, and to be understood as an agreement to pay the sum subscribed in the event of the ship being lost by any of the perils insured against, the non-averment of interest can at most lead only to a conclusion, that this is not an interest policy; supposing, if it were an interest policy, an averment of interest to be necessary and

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and the plaintiff will be entitled to recover, as the assurer of a foreign ship having no interest in it. But if it be an interest policy, the precedents referred to are, we think, authorities for declaring without an averment of such interest. The case of *Goring v. Sweeting*, in *Saunders* 200, was a policy valued at 300*l.*, without further account of the same: the effect of which was to make it unnecessary to prove the amount of the interest at the trial. But that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such averment there could be no breach of the defendant's undertaking: which is the objection in the present case. Nor could the allegation of an offer to abandon supply the want of the averment; for that was an allegation perfectly immaterial; it need not have been proved to have entitled the plaintiff to recover an average loss; and a total loss might have been recovered without it. And though the plaintiff offered to abandon such interest as he had; yet inasmuch as it would not follow from thence that he had any interest, it could not supply the want of an allegation; which, according to the argument in this case, is most material and essential, to shew a breach of the defendant's contract; the want of which a verdict would hardly have helped; for such allegation would have been proved by proof of a paper delivered to the defendant, couched in the terms of that allegation, without any proof whatever of interest. It may be inferred from the offer to abandon in that case, that it was a policy on interest; notwithstanding which no objection was taken to the want of the averment, now insisted on by *Saunders*, who, for acuteness and knowledge of pleading, was exceeded by no one, and who appears dissatisfied with the determination against him. It is therefore, as a precedent, a very strong authority in favour of the plaintiff. *Vidian* 26, is another declaration on a similar policy on the same ship, at the suit of another plaintiff, in the same form. *Vidian* 48, is an insurance on the ship *and goods*: and the averment is, that the plaintiff was possessed of part of the ship on a certain day, and that afterwards divers goods were loaded on board her, with which she sailed, and that those goods were exchanged for others, and that the ship was taken with those last-mentioned goods; but it contains no averment that those goods were the plaintiff's, or that he loaded them, or that he had any interest in them: one or other of which allegations, according to the argument for the defendant, was necessary to shew that the plaintiff was damni-

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fied by the loss of the goods, and to entitle him to recover for them. *Clift* 77, was admitted to be a precedent in favour of the plaintiff. As to *Jeffrys v. Legendra*, that precedent does not support the plaintiff's case; for, upon examining the roll, it appears that an interest is averred in the declaration, and found by the special verdict. Subsequent to the stat. 19 *Geo.* 2, we do not find any instance where, in cases within that statute, an interest has not been averred; which, from its universality, compared with the instances before the statute where it has not been done, affords some inference, that without such averment, a policy made in the form this is, is not necessarily to be taken to be an interest policy: and we are not apprized of any case since that time, except *Crawford v. Hunter*, where the policy could be made without interest; in which, by the terms of the policy, the assured might not aver an interest without subjecting himself to a greater degree of proof than if he had omitted it. Such was the case of *Thelluson v. Fletcher*, *Dougl.* 301, which was a policy on foreign ships; in that case there was an averment of interest: but as the policy was to be sufficient proof of interest, that averment would be proved without going a step further than would have been necessary, had there been no such averment; and therefore such precedents have little weight in determining the question. In *Crawford v. Hunter*, the fourth count of the declaration was in the form used in this case, and was holden good on demurrer. Whatever therefore might have been our opinion, if we were now called upon to put a construction for the first time on this instrument, considered perhaps in its most proper signification as a contract of indemnity: yet after the precedents I have alluded to, and the late decision on demurrer, until that judgment, if it be wrong, shall be corrected in a court of error, we think its authority should rule similar cases. And if the underwriters apprehend any inconvenience from the assured being entitled to recover on a policy without averring an interest, which does not by the terms of it profess to be without interest, they may easily obviate such inconvenience by adding to the policy the words "on interest." We are therefore of opinion that, in the present case, judgment must be given for the plaintiff. And I will add that Lord *Kenny*, who was present at the first argument of this case, was strongly of the same opinion.

Judgment for the Plaintiff.

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declare as * executors, and to make a profer of the letters testamentary; and therefore the stat. 23 H. 8. c. 15, which gives costs to a defendant on a nonsuit, being confined to actions of covenant on contracts made *with the plaintiffs*, does not apply.

Curia adv. vult.

GROSE, J. now delivered the opinion of the Court (Lord *Ellenborough*, C. J. having been absent when the case was argued). This was an application for the Master to tax the defendant his costs on judgment as in case of a nonsuit, in an action of covenant brought by the plaintiffs, as executors of *Simon Cook*, against the defendant, on his covenant to furnish materials for the reparation of certain premises demised by the defendant: and the breach of covenant assigned is in not furnishing the plaintiffs, the executors of the lessee, with those materials, on a demand made subsequent to the lessee's death. This case was attempted to be distinguished from that of *Tattersall v. Groote*, 2 Bos. & Pull. 255, which is the last case on the subject, and in which all the prior cases are considered; by saying, that in this case the plaintiffs might have declared as assignees of the demised premises; and that as it was not necessary to style themselves executors, they shall not by so doing protect themselves from the payment of costs. But we do not think that distinction is supported by the cases on which the argument of the defendant's counsel is founded; for they are cases in which the plaintiffs did in no respect entitle themselves to maintain their actions in consequence of their representative character; but would have been entitled to recover had that description of themselves been omitted in the declaration; and though they had made no profer of any probate or letters of administration: but if those matters had been omitted here, the plaintiff's declaration would have been demurrable: but with those circumstances they shew on the face of the pleading a perfect right to maintain this action, as the personal representatives of the lessee, for a breach of a contract made with their testator, and not with themselves. We therefore are of opinion, that this case falls within the rule of *Tattersall v. Groote*; and that the Master did right in not taxing the defendant his costs.

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against CHARNOCK.

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Monday,

May 31st.

IN trover for the ship *Mary Ann*, it appeared in evidence at the trial, at the Sittings at *Guildhall*, before *Le Blanc, J.* that the bankrupt residing at *Liverpool*, being greatly indebted to the defendant before his bankruptcy, and being possessed of two-third parts of the ship in question, on the 23d of *August*, 1800, executed a bill of sale of the same (the ship being then at sea,) to the defendant, who was resident in *London*, as a security for the debt then due, and for further advances, and transmitted the same to him, with a letter dated the 27th of the same month, in which he requested the defendant to hold the assignment till he (*Kirkpatrick*) might want it. The defendant wrote in answer, on the 12th of *September*, that he had examined the assignment, which he thought was no security to him at all, being void of the regular forms prescribed by the Act of Parliament (meaning the Registry Act after-mentioned); and therefore that he should return it to *Kirkpatrick*. The instrument, however, was not returned. But the bankrupt having communicated with * the attorney who had prepared it, and obtained advice from him what further steps were proper to be taken by the defendant in order to perfect his title to the ship, by pursuing the requisitions of the Registry Act, in the instance of a vessel at sea, wrote to the defendant to advise him of the same: in answer to which, the defendant, by letter dated 19th *September*, observed, that the explanation respecting the security on the ship had not at all relieved his mind on the subject. And again, by letter of the 12th of *November* 1800, the defendant wrote to *Kirkpatrick*, that as the *Mary Ann* had sailed from *Hamburgh*, he supposed that *Kirkpatrick* had taken care to get her insured; adding, that if he wished to have the assignment back again, which he (*Kirkpatrick*) had made to him (the defendant) he would send it or deliver it over to whom *Kirkpatrick* pleased. And it was not till the 1th of *November* that the defendant consented to accept of the assignment, threatening the bankrupt at the same time with legal process, in order to compel a further security for his demand. On the 19th of *November* *Kirkpatrick* committed an act of bankruptcy. It further appeared, that the bankrupt, when he executed and transmitted the assignment of his two-third shares in the ship to the defendant, did not deliver up possession of the original bill of sale of the same shares to himself, but the same

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the Registry Acts of the 26 Geo. 3. c. 60. and 34 G. 3. c. 68. s. 16. though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass, but the assignees of the bankrupt may recover the possession of such ship in trover.

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 ———
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 and Others
 against
 CHARNOCK.

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same continued in his custody till after the bankruptcy, when it was found in his chest by the assignees under the commission. The ship was at sea, or in the river *Humber*, in the course of her voyage outwards to *Hamburgh* and *Norway*, when the assignment was executed and delivered to the defendant, and did not return to the port of *Liverpool*, where she was registered, till the 7th of *March*, 1801. None of the requisites of the Registry Acts 26 *Geo. 3. c. 60*, and 34 *Geo. 3. c. 68. s. 16*, made necessary in the case of a transfer of property in a ship at sea, were complied with by the defendant until the 5th of *December*, 1800, when all that could then be done were performed, and the remainder on the arrival of the ship in port.

It was insisted at the trial, that the bankruptcy having intervened between the original assignment by the bankrupt to the defendant, and the 5th of *December*, when the requisites of the Registry Acts were complied with, no property passed from the bankrupt prior to the period when by law he was divested of the power of transferring it; and *Le Blanc, J.* being of that opinion, directed the Jury accordingly, who found a verdict for the plaintiffs.

A rule *nisi* was obtained in *Easter Term* last for setting aside the verdict and having a new trial; against which *Park, Holroyd*, and *Littledale*, shewed cause in this Term; and *Erskine, Gibbs*, and *Giles*, were heard in support of it. It is unnecessary to detail the arguments, as they are particularly noticed in the judgment of the Court.

The Court took time to consider the case; and now

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LAWRENCE, J. delivered the opinion of *Le Blanc, J.* and himself: observing first, That if they had had any doubt they would have had the case argued again, as Mr. Justice *Grose* was not present in Court when it was argued.—This was an action of trover for a ship, brought by the plaintiffs, assignees of *Kirkpatrick*, a bankrupt, against the defendant, who claimed two-third parts of it, as the vendee of *Kirkpatrick*, before his bankruptcy. The facts of the case are shortly these: *Kirkpatrick* being indebted to the defendant in more than the value of his share of the ship, in *August* made a bill of sale thereof to the defendant, and sent it to him: but the defendant declined accepting it till the 15th of *November*, 1800: and on the 19th *Kirkpatrick* became a bankrupt. On the 5th of *December*, and not before, the requisites of the stat. 34 *Geo. 3. c. 68. s. 16*, in respect of the transfer of ships not in port were complied with, and within ten days after the return of the ship to port, an in-

dorsement

dorsement was regularly made on the certificate of the registry, and the other requisites of the Act complied with : but at the time of the bankruptcy, the bill of sale of two-thirds of the ship from *Swainstone* and *Crookendale*, the former owners, remained in the possession of *Kirkpatrick*. The Jury having found for the plaintiffs, and a new trial having been moved for, it has been resisted on two grounds ; first, That the plaintiffs are entitled to recover, under the stat. 21 *Jac.* 1. c. 19, because the bill of sale from *Swainstone* and *Crookendale* remained with *Kirkpatrick*. Secondly, Because the requisites of the stat. 34 *Geo.* 3. c. 68, not having been complied with before the bankruptcy, the sale was not complete at that time. In answer to which it has been said by the defendant's counsel, That since the stat. 26 *Geo.* 3. c. 60, and 34 *Geo.* 3. c. 68. s. 16, which provide for a notorious transfer of property in ships, the non-delivery of the grand bill of sale will not vitiate the transfer of a ship, as that can be no longer any badge of fraud. And as to the last objection, that as the requisites of the stat. 34 *Geo.* 3, were complied with within a *reasonable* time after the execution of the instrument of sale, that will by relation make the sale complete from the 15th of *November*, a time before the bankruptcy. As my brother *Le Blanc* and myself are of opinion with the plaintiffs on the second objection, it is not necessary for us to say any thing on the first : but thus much may be observed, that if we look at the prevention of frauds, the necessity of the quickest compliance with the requisites of the stat. 34 *Geo.* 3, is obvious ; for if they were delayed, and the grand bill of sale or other muniment might remain with the vendor, a door would be opened to the greatest frauds, from the reliance men would place on the possession of such bill of sale, when no evidence of any transfer from the possessor could be found on searching the registry.

As to the second objection ; one of the great objects of the stats. 26 & 34 *Geo.* 3, was to prevent foreigners being concerned in *British* ships, without being subject to the disadvantages belonging to that character ; and [as the most effectual means of coming at an immediate knowledge of such transfer] has made the validity of the transfer of every ship or vessel, with a very few exceptions, depend upon the compliance with certain circumstances, which must convey to the public the fullest information on that subject. The words of the stat. 34 *Geo.* 3. c. 68. s. 16, as they respect the case before us, are, " That if
 " any ship or vessel shall be absent from the port to which she
 " belongs

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Moss
 and Others
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 CHARNOCK.

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1802. " belongs when any alteration in the property thereof shall be
 Moss " made, so that an indorsement or certificate cannot be *imme-*
 and Others " *diately* made, a copy of the bill of sale shall be delivered
 against " [to the person anthorized to make registry, who is to do cer-
 CHARNOCK. " tain things directed by the Act]; and within ten days
 " after such ship or vessel shall return to the port to which she
 " belongs, an indorsement shall be made, and a copy of it de-
 " livered in manner before-mentioned; *otherwise* such bill of
 " sale, or contract or agreement for sale, shall be *utterly null*
 " *and void to all intents and purposes whatsoever.*" Such being
 the words of the Act, the public will be most effectually served
 by holding, that no interest shall pass from any owner in *British*
 ships to any other, until the public has that information which
 [404] is so essential to its commercial welfare: and the objects of the
 parties to such contract will be best consulted by allowing the
 longest time to comply with the requisites of the Act, so as that
 which was meant to operate as a certain means of compelling
 men to give that information, be not destroyed or weakened.
 And this will be done by construing the statute as enacting,
 That no bill of sale or other such instrument shall have any
 operation or effect, until the requisites imposed on the parties
 to the sale are complied with: and by not allowing any relation
 to hold good, so as to make the conveyance effectual from any
 antecedent time. By such construction the parties to the con-
 tract will be most strongly called on to comply immediately
 with the requisites of the Act; which not only from its general
 scope, but from the words of it, it is evident were intended
 to be done without delay. And the purchaser will not lose the
 benefit of his contract, if at any time he comply with the re-
 quisites before the rights of others intervene. But if this Act
 were to be considered as giving an indefinite time for the com-
 pliance with its requisites, it would enable a transfer of prop-
 erty to be made to foreigners, who might remain concealed own-
 ers until the return of the vessel to her port, which might
 not be for a great length of time. Or if the Act is to be un-
 derstood as allowing a certain reasonable time for complying
 with the requisites after the execution of the bill or other con-
 tract of sale, and by any inadvertence that time should be ex-
 ceeded [as to the extent of which there may be very different
 opinions] the consequence would be, that the sale would be for
 ever null and void, however great the damage might be to the
 purchaser.

This case has been compared to the cases of enrolments of bargains *and sales under the statute 27 *H.* 8.; according to the construction of which statute, if the deeds be enrolled within the six months, the estate will pass. But the words of the two statutes are very different; the statute of *H.* 8. enacts, That no manors, lands, &c. shall pass or change where any estate of freehold shall be made by any bargain and sale, *except* the same be by writing indented, sealed, and enrolled within six months next after the date of the indenture. But the statute of *Geo.* 3, on the construction of which we are now deciding, enacts certain things to be done, otherwise the bill of sale shall be utterly null and void to all intents and purposes: which words are most materially different from those in the statute of enrolment. And we are not aware of any authority to shew, that if a statute direct certain things to be done to give effect to an instrument, without limiting a time for doing it, that such statute is to be construed as if it had said, that it shall be sufficient if the thing be done within *a reasonable* time; instead of understanding the statute as enacting, that the instrument shall have no operation or effect until what the statute requires shall have been complied with. For these reasons, my brother *Le Blanc* and myself are of opinion, There should not in this case be a new trial.

Rule discharged.

1802.

Moss
and Others
against
CHARNOCK.
*[405]

DIMSDALE *against* NIELSON.

[406]

Monday,
May 31st.

RULE to shew cause why interlocutory judgment, signed by the plaintiff, should not be set aside with costs for irregularity, and proceedings stayed, &c.

The defendant was arrested at *Liverpool* on the 15th of *May* instant, on a *testatum special capias* issued the 11th, returnable in one month from *Easter* (being *Sunday* 16th *May*); to which the defendant put in special bail before a commissioner at *Liverpool* on the 17th *May*, who then justified by affidavit. On the same day the plaintiff filed a declaration conditionally, and served notice thereof on the defendant at *Liverpool*, and gave him a rule to plead thereto at the same time. The bail-piece was allowed and filed with the filacer; and notice thereof, with a copy of the affidavit of the bail, was given to the plaintiff's attorney on the 20th of *May*; and on the same day the defendant filed a plea in abatement. Notice of exception to the bail was given on the 21st; in consequence of which, notice of justification

In a country case, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the Court.

tion

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 DIMSDALE
 against
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tion of the said bail by affidavit was given for the 25th, when the bail did accordingly justify in Court. Notwithstanding which the plaintiff's attorney demanded a plea on the 26th, and afterwards signed judgment for want of it, and gave notice of a writ of inquiry.

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Littledale, in support of the rule, observed, That by the practice (a) the plaintiff, in a country cause, has twenty days to except to the bail, before which the defendant cannot perfect them; and therefore if the defendant were not to be considered as sufficiently in Court before the perfecting his bail, so as to be entitled to plead in abatement, defendants in the country must be altogether excluded from pleading in abatement, if the plaintiff choose to accept the bail, although it may afterwards appear that proper bail had been put in in time.

Scarlett, *contrà*, relied on *Venn v. Calvert* (b), where a plea filed before the bail were perfected was holden a nullity, although they afterwards justified; and therefore the plaintiff was entitled to sign judgment as for want of a plea, the bail not having justified till after the time for pleading was out.

LORD ELLENBOROUGH, C. J. The defendant appears to me to be in Court after he has put in bail, unless it turn out that the bail on exception taken are afterward set aside. But if the bail are ultimately accepted, the defendant has done every thing which it was in his power to do, and therefore ought not to be deprived of any benefit which the law gives him.

LAWRENCE, J. observed, That in the case of *Venn v. Calvert*, the plea must have been a plea in bar, pleaded after the bail had been excepted to, and it would be impossible, if the plaintiff delivered his declaration conditionally, and delayed excepting for
 [408] four days, that a defendant could ever plead in abatement: as by the rules of the Court he must plead in abatement within that time.

Per Curiam,

Rule absolute.

(a) 1 *Tidd*, 134.

(b) 4 *Term Rep.* 578.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

In the Forty-second Year of the Reign of GEORGE III.

1802.

WILDEY *against* THORNTON.

Saturday,
June 19th.

THE defendant was holden to bail on an affidavit, stating that he was "indebted to the plaintiff in 50*l.* upon and by virtue of a certain agreement dated 30th November 1801, under the hands of (the parties); whereby each of them bound himself unto the other in the said sum of 50*l.* for the true performance of the said agreement; and which agreement the said defendant hath neglected and refused to perform on his part," &c.

Reader moved, That the defendant might be discharged out of custody on filing common bail, on the insufficiency of the affidavit in not stating what the agreement was, or the breach of it; so that the Court could not know whether the 50*l.* were stipulated damages or a penalty: for the former of which only the defendant could be holden to special bail. He cited *Salk.* 100. *Anonym.*, *Whitfield v. Whitfield* (a), *Archer v. Ellard* (b), and *Brookes v. Friend* therein cited. *Stinton v. Hughes* (c), and *Hatfield v. Linguard* (d), and observed, that since the stat. 8 &

An affidavit to hold to bail for a certain sum for the breach of an agreement, must shew that the sum is stipulated damages, and not merely a penalty: stating that the defendant bound himself in a certain sum to [410] perform a certain agreement; and that he had neglected and refused to perform his part is not sufficient.

(a) *Barnes* 109. qto.

(b) *Sayer* 109.

(c) 6 *Term Rep.* 13.

(d) *Ibid.* 217.

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WILDEY
against
THORNTON.

9 *W. 3. c. 11. s. 8*, the penalty was not to be considered as the debt even at law; for execution could not be taken out for it, but the real damages must be assessed by the Jury.

Espinasse shewed cause in the first instance, and contended that the 50*l.* for which the defendant had been holden to bail appeared to be stipulated damages, and not a penal sum: and here it was stated that the agreement had been broken; which distinguished this case from *Stinton v. Hughes*.

Lord ELLENBOROUGH, C. J. The rule is clear, that for stipulated damages the defendant may be holden to bail; but not for a penalty. But the objection here is, that it does not appear on the face of the affidavit to be a case of stipulated damages: it is not stated what the agreement was, nor in what respect it was broken.

Per Curiam,

Rule absolute.

[411]

Monday,
June 21st.

The KING against PALMER.

The Court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money, there being no practice to warrant it; and referred him to his action if he were supposed to have a right to it under the stat. 23 *H. 6. c. 9*.

AN attachment had issued against an attorney for non-payment of money recovered by him for his clients; under which the sheriff of the city of *Worcester* had levied the sum due upon the attachment, out of which he claimed to retain for his poundage: whereupon

Gurney moved in the last Term, That the said sheriff should pay over to the plaintiffs in the cause or their attorney 7*l.* 15*s.* (being the sum retained by him for his poundage on the levy under the attachment) together with the costs of the application. He relied on the claim being unprecedented in the instance of an attachment, which was a criminal proceeding, and not included in the stat. 29 *Eliz. c. 4*, which only authorizes sheriffs to take poundage in levying under any *extent* or *execution*.

Wigley, contra, contended that the sheriff was entitled to his poundage on executing an attachment for non-payment of money, that being in the nature of a civil remedy. So one in custody upon an attachment for non-payment of costs (*a*) under statute 5 & 6 *W. & M. c. 11. s. 3*, was holden entitled to be discharged under the Lords' Act. And one convicted in a penalty under the Lottery Act (*b*) was deemed privileged from arrest on a *Sunday*. It was there said by *Buller, J.* to have been settled

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(a) *R. v. Stokes, Cowp. 136.*

(b) *R. v. Myers, 1 Term Rep. 265.*

of late years, that an attachment for non-performance of an award was only in the nature of a civil execution (a). So *Taylor v. Scott* (b). In *R. v. Jetherell* (c) the sheriff was holden entitled to poundage on levying under an extent; and this is confirmed in 5 *Com. Dig.* tit. *Viscount*, F. 1. [Lord *Ellenborough*. The stat. 29 *Eliz.* c. 4. has the words *extent* or *execution*.] Lord *C. B. Comyns* also says, that the sheriff shall have his poundage on levying a fine for a misdemeanour by process of *B. R.*, for which he cites 2 *Jon.* 185. The stat. of *Elizabeth* merely restrained the sheriff in certain cases from taking exorbitant fees; but the statute under which he claims his fees is the 23 *H. 6. c.* 9, which expressly extends to *attachments* as well as arrests.

Gurney observed, That the omission of the word *attachment* in the latter stat. 29 *Eliz.* c. 4, when the matter was again under the review of the Legislature, shewed that they intended to exclude the sheriff from taking poundage in such cases; and that construction was confirmed by the universal practice since that time.

Curia adv. vult.

LORD ELLENBOROUGH, C. J. in this Term said, That the Court considered it to be a sufficient ground to discharge the rule that there was no practice to warrant the sheriff in taking poundage in this case. That if he were supposed to be entitled to it, he might bring his action for it.

Rule absolute, but without costs.

(a) Vide also *R. v. Pickerill*, 4 *Term Rep.* 309.

(b) Cited in *Cowp.* 394.

(c) *Parker's Rep.* 177.

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The KING
against
PALMER.

[413]

THE KING against The Inhabitants of UPPER PAPWORTH.

Monday,
June 21st.

THE defendants, the inhabitants of a parish in *Cambridgeshire*, were convicted on an indictment preferred at the assizes for the non-repair of a turnpike road which led through their parish; which indictment having been removed by *certiorari* at the instance of the prosecutor into this Court, a rule was obtained, calling on the defendants to shew cause why a fine of 1200*l.* should not be imposed on them: and calling on the trustees of the turnpike to shew cause why the fine and charges should not be apportioned between themselves and the parish, were originally preferred at the assizes, and afterwards removed hither by *certiorari*.

Under the stat. 13 *Geo.* 3. c. 51. s. 33, this Court may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike though the indictment *certiorari*.

1802.

The KING
against
The Inhabitants of
UPPER
PAPWORTH.

Garrow and *Wilson*, on behalf of the trustees, first took an objection to the jurisdiction of the Court to apportion the fine at all; because the stat. 13 *Geo. 3. c. 84. s. 33*, which empowers the Court *before whom such indictment or presentment shall be preferred* to impose the fine, directs that it shall be apportioned between the parish and the trustees in such manner as to *the said* Court upon consideration shall seem just. The application therefore can only be made to the assizes where the indictment was originally preferred.

Erskine and *Gibbs* for the parish said, That if such were the construction of the Act, this Court would not impose any fine at all on the parish if they were precluded from doing that justice between them and the trustees of the turnpike which the Legislature intended.

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LORD ELLENBOROUGH, C. J. I consider the true construction of the Act to be, that the Court which imposes the fine shall have power to apportion it between the parish and the trust.

The counsel for the trustees then went into a statement of the funds of the trust, in order to shew that no part of the fine could with security to the creditors and the primary objects of the trust be laid upon them: and the counsel for the parish pressing to have time to inspect these accounts,

The Court, after some discussion, consented to enlarge the rule for that purpose.

Abbott for the prolocution.

Rule enlarged.

Tuesday,
June 22d.

TAYLOR against HAGUE.

The proper stamp for a promissory note of 45*l.* is 1*s. 6d.* composed of three different sums applicable to different finds under three Acts of Parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid.

IN assumpsit to recover 45*l.* on a promissory note, dated *November 1801*, the plaintiff was nonsuited at the trial before Lord *Ellenborough*, at the Sittings, because the note was on a 2*s.* promissory note stamp, instead of a stamp for 1*s. 6d.* only, which it was admitted was the proper stamp for a note of that value at the time. A rule *nisi* was obtained for setting aside the nonsuit, on the ground that the stamp used was not only of a greater value, and therefore covering the proper duty, but it was also a stamp peculiarly appropriated to the same kind of

instrument,

instrument, and therefore applicable to the same purposes as the proper stamp.

* *Erskine* and *Reader* shewed cause against the rule; and referred to *Robinson v. Dryborough* (a) and *Farr v. Price* (b), where it was settled that no other than the proper appropriate stamp was sufficient, although the revenue were not injured, as where a stamp of a greater value was used. It is true that in the former case there was a stamp of a different denomination; but that does not vary the consideration, because the ground of the determination was that the several duties were appropriated to the payment of distinct funds. They then attempted to shew that a single 2s. stamp adapted to a promissory note of higher value than the present, was applicable to different funds from the 1s. 6d. stamp. The stat. 31 *Geo.* 3. c. 25. s. 1, repeals all former stamp-duties of this description; and s. 2. re-enacts new duties: 1st, For promissory notes above 40s. and not exceeding 5l. 5s. a duty of 3d. 2dly, For the same above 5l. 5s. and not exceeding 30l. a duty of 6d. 3dly, For the same above 30l. and not exceeding 50l. duty of 9d., and so on in proportion. The stat. 37 *Geo.* 3. c. 90. s. 1, adds 1d. to notes of the 1st class; 2d. to notes of the 2d class; and 3d. to notes of the 3d class. Lastly, The stat. 41 *Geo.* 3. c. 10. s. 1, adds 2d. to notes of the 1st class; 4d. to the 2d class; and 6d. to the 3d class. Then, as to the application of the duties, all under the stat. 31 *Geo.* 3. are by s. 34, (after satisfying certain charges) to go to the consolidated fund. Under the stat. 37 *Geo.* 3. c. 90. s. 22, the additional duties are applicable in the first instance to the increased charge of any loan made in that session, and a distinct account thereof to be kept for ten years. And under the stat. 41 *Geo.* 3. c. 10. s. 12, they are to be applied in like manner to any loan of that session, and kept apart for ten years, and afterwards to be carried to the consolidated fund. The several parts then of a 1s. 6d. stamp appropriated to a note of this value are 9d. under the first Act, applicable to the consolidated fund; 3d. under the second Act, applicable to a particular fund; and 6d. under the third Act, applicable to another particular fund. Whereas there is no single 2s. stamp which is applicable in adequate proportions to the same funds; nor any 2s. stamp, however made up, which is applicable to a note of this value.

The Court thereupon desired inquiry to be made how the 2s.

(a) 6 *Term Rep.* 317.

(b) *Ante*, 1 vol. 55.

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TAYLOR
against
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*[415]

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1802.

TAYLOR
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stamp on which the promissory note in question was written was constituted, whether composed of a single sum, or of different sums amounting to 2s.: because it was observed that a 2s. stamp might be composed of 1s. under the stat. 31 *Geo.* 3.; of 4d. under the stat. 37 *Geo.* 3.; and of 8d. under the 41 *Geo.* 3.: in which case the several component parts would be applicable, though in a larger proportion than was necessary, to the several funds to which the several component parts of the proper 1s. 6d. stamp were directed to be applied.

The matter stood over to ascertain the fact; and it appearing that the note in question was composed of a 1s., a 4d., and an 8d. stamp, the Court observed that the foundation of the objection was now removed; for it appeared that more than sufficient of the stamp used was applicable to the respective funds to which the proper 1s. 6d. stamp was appropriated. Rule absolute.

[417] *Gibbs*, who was to have supported the rule, referred to s. 19 of 31 *Geo.* 3; which provides that no promissory note, &c. shall be given in evidence in any Court, unless “stamped with a lawful stamp, to denote the duty as by that Act directed, or some higher duty in that Act contained,” &c.: and the subsequent Acts refer to and incorporate the general provisions of the former.

LAWRENCE, J. in the course of discussing the case on the former day, adverted to another statute in *pari materiâ* 37 *Geo.* 3. c. 136. s. 1; which enables the commissioners, where any note, &c. is written on a stamp of a different denomination but of an equal or greater value than the stamp required, to affix the proper stamp on payment of a penalty of 5*l.*

Wednesday,
June 23d.

The KING against The Inhabitants of ST. HELEN, in the
City of WORCESTER.

An order for
taxing one
parish in aid
of another,
under the
statute 43

AN order was made by the justices at the Quarter Sessions holden for the county of the city of Worcester, grounded on the stat. 43 *Eliz.* c. 2. s. 3.

Eliz. c. 2. s. 3, held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution between each other, under special officers, who were empowered to purchase land for the erection of poor-houses and for a burial-ground; there being a proviso in the Act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace “to tax parishes in aid of others by virtue of the statute 43 *Eliz.* as fully as if this Act had not been made.”

By

By which order (removed into this Court by *certiorari*) dated 5th of *April* 1801, and directed to the churchwardens and overseers of the poor of the parish of *St. Helen*; “after reciting “that complaint had been made unto that Court, that the parish “of *St. Andrew* in the said city of *Worcester* and county of the “same city, was greatly overburthened with poor, and that the “inhabitants of the said parish were unable to raise and levy “among themselves sufficient sums of money for the maintenance “of the poor thereof: and after further reciting that it had also “been represented unto that Court that the inhabitants of the “parish of *St. Helen* in the said city and county of the same city “were of sufficient ability to aid and assist the inhabitants of the “said parish of *St. Andrew* in the maintenance of the poor thereof, “that Court, upon hearing (the parties) and upon due proof, &c. “adjudged the said premises to be true, &c.; and did thereby in “pursuance of the statute in that case made, rate and assess the “said parish of *St. Helen* at the sum of 1*l.* 12*s.* 8*d.* monthly and “every month, in aid of the said parish of *St. Andrew*: and did “thereby order the overseers, &c. of *St. Helen* to pay the said “sum of 1*l.* 12*s.* 8*d.* to the overseers, &c. of *St. Andrew*, from the “5th of *October* then instant, until the 1st of *April* next, for and “towards the purposes in the said Act mentioned.”

It was not denied but that the order was good under the statute of *Elizabeth*; but it was contested upon the ground of a local Act of Parliament passed in the 32 *Geo. 3. c. 99*, intituled, “An Act for the better relief and employment of the poor of “the several parishes within the city of *Worcester*, and of the “parishes of *St. Martin* and *St. Clement*, which are partly within “the city and partly within the county of *Worcester*, and for “providing a burial-ground for the use of such parishes.” That Act reciting that the poor within the several parishes named (including *St. Andrew*’s and *St. Helen*’s) are supported at a burthensome expence; for their assistance and relief incorporates them by the name of “the wardens of the poor of the several parishes in the city of *Worcester* and of the parishes “united therewith:” and directs how the principal officers, therein called “Directors,” and certain other officers, shall be chosen from time to time. It then enables the directors to purchase land and erect buildings thereon for the purposes of the Act, and also to purchase other land for “a burial-ground, “for the general use of all the parishes aforesaid, in manner “therein

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“therein mentioned; which burial-ground should be the pro-
“perty of the corporation, who were to have all the produce
“and benefit therefrom, allowing to the inhabitants of the pa-
“rishes the privilege of burial there on payment of 5s. for each
“corpse,” &c. It enacts that the directors shall have the ma-
nagement of the poor, and enables them to inclose part of the
ground next the house of industry for a burial-ground for such
as die in the said house; and enables them generally to provide
for the relief of the poor, placing out apprentices, &c. It also
gives them a power to borrow money not exceeding 10,000*l.*
and to secure the interest and principal. Then, in order to
raise an adequate fund for the purposes of the trust, the di-
rectors are “*empowered to fix and ascertain* with as much equa-
“lity and fairness as may be, such sums of money (regard being
“had to such average of the rates within the said several pa-
“rishes as thereafter mentioned) upon the said several pa-
“rishes, as should be needful from time to time, for paying the
“interest of the money borrowed, paying off the principal, and
“defraying the charges and expences of maintaining the poor,
“and for all other the purposes of the Act.” It then directs
how the quotas of the respective parishes are to be fixed, *ac-*
cording to the average expenditure of each parish for the five pre-
ceding years, &c. Afterwards there is a proviso, “That nothing
“in this Act contained shall extend, &c. to repeal, lessen, or
“alter the power of justices of the peace to tax parishes in aid
“of others by virtue of the stat. 43 *Eliz.* or otherwise; but that
“the same powers shall be and remain as fully and effectually
“to all intents and purposes as if this Act had never been
“made.” The directors are also empowered to grant certifi-
cates, and to take bonds of indemnity against bastards, and are
enabled to control the overseers in appealing against orders of
removal of poor persons.

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Onslow, Serjt. took objection to the order, on the ground
that the Act of the 32 *Geo.* 3. had superseded the provisions of
the 43 *Eliz.* in this respect; and that the saving proviso in the
stat. of *Geo.* 3. was merely intended to apply as between the in-
corporated parishes and other parishes in the county at large;
for it mentions the word *parishes* generally, and not the *said*
parishes, as in other parts of the Act, where the incorporated
parishes are meant to be referred to. He contended, that the
provisions of the two Acts were incompatible, and the money to be
raised

raised under each was applicable to distinct objects, amongst others, under the stat. of *Geo. 3.* for the purchase of land and building of houses, and the purchase of a burial-ground; whereas under the stat. of *Elizabeth* it could only be applied to the employment and maintenance of the poor. Different officers too were appointed to collect the money by the two statutes. The latter statute also fixes a certain proportion of contribution between the respective incorporated parishes, which is altogether inconsistent with the order in question, and is in effect repealed by it. He also commented on the particular wording of the order and the stat. 32 *Geo. 3.*

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Gaselee and *Jervis* contra, relied principally on the proviso, [421] by which the order in question, under the stat. of *Elizabeth*, was saved: though they also contended that the two statutes were not inconsistent in their general provisions, the one being in aid of the other.

LORD ELLENBOROUGH, C. J. This is a very plain case upon the construction of the stat. 33 *Geo. 3.* which was passed for the better maintenance of the poor in the city of *Worcester*. The several parishes of the city which subsisted distinctly before the Act, were thereby incorporated for certain purposes; but for all others they still continued to be as distinct as before. Before that Act they certainly might have been rated in aid of each other under the stat. 43 *Eliz.*; and for fear it should be doubted whether the Act of *Geo. 3.* did not do away the provision of the former Act in that respect, the proviso in question was introduced, in which it is expressly saved. Then it is said that this was only intended to apply to extra parishes, and not to the parishes incorporated; but the wording is general, reserving power to the justices to tax *parishes* in aid of others as fully as before; that extends to all parishes. For this purpose, therefore, the incorporated parishes were still to remain independent as before, whenever the respective quotas directed to be raised under the Local Act were found insufficient to provide for the maintenance of their respective poor.

GROSE, J. The proviso referred to, expressly saves to the incorporated parishes the benefit of the 43 *Eliz.* in this respect as before the Act of *Geo. 3.* [422]

LAWRENCE, J. The proviso is in general words; and is not narrowed, as contended for, to other parishes than those incorporated, but extends to all alike, as well those in the county at large

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large as those in the county of the city of *Worcester*, not included in the Act (*a*). It is said that the proviso could not be intended to include the incorporated parishes, because the money, when raised under the present order, is to be carried to different purposes than those directed by the stat. 43 *Eliz.* under which it is made. But that is begging the question: the money raised under the Local Act must indeed be applied as that Act directs: but the money raised under the stat. 43 *Eliz.* is to be applied as that statute requires.

[423] LE BLANC, J. The argument in support of the objection has proceeded on the very ground which the proviso was intended to obviate: for without the introduction of that proviso it might have been argued that the statute had fixed certain quotas between the incorporated parishes, which were meant to be irrevocable. But the Legislature having in view that cases might occur where those quotas would not be sufficient for the maintenance of the poor of any particular parish, have directed, That notwithstanding the quotas should be fixed between the incorporated parishes, according to a certain average rate, for the purposes of the Local Act, yet that money might still be raised as before, by taxing parishes in aid of others, under the stat. 43 *Eliz.* for the purposes directed by that statute. And it is no answer to say, that the money, when raised under this order, will be applied to the same purposes as the fund raised under the Local Act; for if the objects of the latter be different from those of the stat. 43 *Eliz.* it will not follow that the money raised under the one, will be applied to the purposes of the other: but the money raised under either will be applied to its own respective purposes. However, I do not see that the objects of the two Acts are essentially different: the Local Act was in aid of the 43 *Eliz.* They have both the same general object to provide for the poor. But it is not necessary to go that length; because if the purposes to which the money is to be applied under the two Acts be different, it will not follow that the money to be raised under this order will be applied to the purposes of the Local Act.

Order confirmed.

(*a*) There were stated to be two other parishes in the city not included.

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The KING *against* The Inhabitants of HANBURY.Wednesday,
June 23d.

TWO justices by an order removed *J. Freeman, Mary* his wife, and *Ann* their daughter, from the parish of *Tardebigg*, to the parish of *Hanbury*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case: The pauper, *John Freeman*, a blacksmith, went six and thirty years ago to one *Saunders*, a blacksmith, at *Hanbury*, to know if he wanted a man. *Saunders* told him that he might come to work for a day or two, and he should see what he could do. The pauper went accordingly on the following *Monday* morning, and after two or three days' trial, *Saunders* approving of him, the pauper agreed to work for *Saunders* as a blacksmith, at three shillings and sixpence a week, with meat, drink, washing and lodging at *Saunders's* house, and to part on a week's notice by either party. No such notice was ever given; but the pauper continued to serve *Saunders* until the time of his death, which happened about six years afterwards, without any alteration of terms, except that after he had served about four years, the wages were raised from three shillings and sixpence to four shillings a week. The pauper constantly received his week's wages every *Saturday* night or *Sunday* morning. He went where he pleased on the *Sundays*, without asking leave of his master; though he was entitled to his board on *Sundays* as well as on other days, if he chose to stay at home. He did not work on *Sundays* as the apprentices did who were kept at home for that purpose, except occasionally when asked by his master. On other days, if he wanted a holiday, he used to ask his master for it, who gave it him, deducting his wages for the time. His master also used frequently to set him task-work for the day, which he sometimes finished in half the day, and then he was at liberty for the rest; but he frequently did over-work upon those occasions; and then he was paid for such over-work. The Sessions, being of opinion that this was a general hiring, confirmed the order.

A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring, though the servant continued six years with the master, and the wages

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were raised during the period: and therefore no settlement can be gained under such hiring and service.

Touchet, in support of the orders, contended, 1st, that the mere continuance of the service for six years was sufficient to warrant the conclusion that there was a general hiring during the period, which the law construes to be a hiring for a year:
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for which he referred to *Rex v. Lyth (a)*, and *Rex v. Long Whatton (b)*; in which latter case it appeared that the servant was at first only hired for a part of the year. [Lord ELLENBOROUGH, C. J. Here * the particular terms of the original agreement are stated, and, therefore, we cannot presume that the pauper served under a different contract.] 2dly, The hiring was for an indefinite time, though the rate of wages was calculated at so much a week: and when the wages were raised, nothing was said about time. At any rate it was a question of fact for the Sessions, and there was evidence sufficient to warrant the conclusion they have drawn. The reservation of weekly wages in *Rex v. Hampreston (c)*, did not prevent the operation of a general hiring.

Gibbs and Jervis, contrà, were stopt by the Court.

Lord ELLENBOROUGH, C. J. The cases of *Rex v. Dedham (d)*, *Rex v. Brandinich (e)*, and *Rex v. Newton Toney (f)*, have expressly decided this point. The first of these was much stronger than the present; for that was a hiring at so much a week, "summer and winter." But Lord Mansfield said that all the cases required a hiring for a year; but that was only a hiring at so much a week. So in *Rex v. Brandinich*, Lord Mansfield observed, that the pauper was under no obligation to serve for a year; and unless that be so, it is clear there can be no settlement gained. The case of *Hampreston* turned on the circumstance of a month's notice to quit being required; but here the contract was determinable at a week's notice. And though the Sessions have drawn a conclusion that this was a general hiring, yet it is clear that they meant only to state it as a conclusion of law from the antecedent facts, the propriety of which

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they meant to refer to us. But here there is no ground for presuming a general hiring; for it appears expressly what the original agreement was in fact, which negatives a hiring for a year.

Per Curiam,

Both Orders quashed.

(a) 5 Term Rep. 327.

(b) *Ibid.* 447.

(c) 5 Term Rep. 205.

(d) Burr. S. C. 653.

(e) *Ib.* 662.

(f) 2 Term Rep. 453, and vide *Rex v. Odiham*, *ib.* 622, S. P.

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MAITLAND and Others *against* GOLDNEY and Another.*Friday,*
June 25th.

IN an action on the case, the first count of the declaration stated, that whereas the plaintiffs before *March* 1800, exercised in copartnership the trade of merchants and dealers in wool, and conducted themselves with honesty in such trade, and delivered just and true accounts to their customers, &c. and before the publishing the libel after-mentioned, enjoyed in their said trade a good name and credit, and the confidence of their customers: and whereas one *Henry Guy*, before the said *March*, and until the time of composing and publishing the libels hereinafter first and secondly mentioned, was a customer of the plaintiffs in their said trade: and the plaintiffs had always delivered to him just and true accounts, &c.: and whereas the plaintiffs had a long time before, &c. to wit, on 1st *March* 1800, made out and sent to *Guy* a true account of certain dealings between him and them in their trade, upon the receipt of which account *Guy* afterwards *hastily and rashly* uttered certain expressions, importing that he was dissatisfied with the said account, and very much disapproved thereof; *but afterwards, and long before the composing and publishing of the libel* (in question) *the conduct of the plaintiffs* with respect to the said account, &c. *was fully explained and justified to the said H. Guy, and he was fully satisfied therewith*, and thenceforth, until, and at the time of publishing that libel, reposed his entire esteem and confidence in the plaintiffs in their said trade, and continued to deal with them, &c. “of all which premises “the defendants,” afterwards and before the publication of the libel hereinafter next mentioned had notice; yet the defendants well knowing the premises, but maliciously contriving and intending to injure the plaintiffs in their said trade, and to cause them to be believed to be guilty of dishonesty and making false accounts, &c. on the 14th *December* 1801, at, &c. unlawfully and maliciously composed and published a certain libel of and concerning the said plaintiffs, “and of and concerning the said “account so by them made out and sent to the said *H. Guy*,” and of and concerning the said *H. Guy*, and the aforesaid expressions so by him uttered, to the tenor and effect following, viz.

In a justification of slander that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words, or to that effect; although in the libel declared on the defendant stated that another had spoken the same slanderous words of the plaintiff, or words to that effect: but the defendant must give the very words used, tho' it be only necessary to prove some material part of them. *Qu.* Whether a defendant can, by naming the original author, justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded? *L* 427 1

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“*Thomas Goldney of Chippenham, &c. and Harry Goldney, of, &c. clothiers, severally make oath and say,—and first the said H. Goldney for himself saith, That some time in the latter end of March 1800, he was present at the White Hart Inn in Chippenham aforesaid, and then and there heard Henry Guy of Chippenham aforesaid, clothier, publicly declare that he had just received (the plaintiffs’) account, &c. that the account was near 400*l.* less than he expected, and that their (meaning the plaintiffs’) conduct was worse than robbing on the highway, or words to that effect; and that he would immediately go to London and bring an action against them; and this deponent, T. Goldney, for himself saith, That soon after the said H. Guy had received his account from the house of (the plaintiffs) as this deponent believes, the said H. Guy came to this deponent’s counting-house, at Chippenham aforesaid, and then and there asked this deponent, T. Goldney, whether he had received his account from the plaintiffs; and this deponent replied, that he had received his account; and the said H. Guy asked him, the said T. Goldney, how his account was, and said that they (meaning the plaintiffs) had robbed him of near 400*l.*; that it was as bad as robbing on the highway, and that he would arrest the house, and drop all kind of connection with them; or words to that purport and effect.” The second count only differed from the first in not stating that the words spoken by Guy were “hastily and rashly uttered;” and in only stating that Guy was afterwards satisfied with the account, without stating that the plaintiffs’ conduct was justified to him. The third count charged the libel to relate to a certain account therein alleged to have been delivered by the plaintiffs to Guy; but did not state that an account had been delivered, or that Guy had expressed himself to be dissatisfied with it, or that he was afterwards satisfied; or that the defendants knew those facts before the publication of the libel in question.*

Pleas. 1st, Not Guilty. 2d. As to the first and second counts, the defendants justified jointly, that before the respective times of composing and publishing the said supposed libels respectively, &c. to wit, on the 1st of April 1800, the said H. Goldney was present at the said White Hart Inn in Chippenham aforesaid, and then and there did hear the said H. Guy publicly

publicly declare *to the effect following*, that is to say, that he had just received *Maitland's* account (meaning his annual account from the house of the plaintiffs); that the account was near 400*l.* less than he expected; and that their (meaning the plaintiffs') conduct was worse than robbing on the highway; and that he would immediately go to *London* and bring an action against them. And the defendants further pleaded, That soon after the said *H. Guy* had received the said account, &c. from the plaintiffs, before the respective times of composing and publishing the said supposed libels respectively, &c. to wit, on, &c. the said *H. Guy* came to his, *T. Goldney's*, compting-house, at *Chippenham* aforesaid, and then and there asked the said *T. Goldney* whether he had received his account from (the plaintiffs); and the said *H. Guy* then and thereupon asked him, the said *T. Goldney*, how his account was, and then and there said to the effect following, that is to say, that they (meaning the plaintiffs) had robbed him of near 400*l.*; that it was as bad as robbing on the highway, and that he would arrest the house, and drop all kind of connection with them, to wit, at, &c. wherefore the defendants at the said respective times when, &c. composed and published the said libels, &c. The defendants also justified separately to the third count in the like manner.

To these justifications there were demurrers, assigning for special causes, that the defendants have not by their second plea justified or answered the special matter in the inducements to the first and second counts respectively contained, nor have averred that the matters in that plea alleged to have been declared and said by the said *H. Guy* are, or that any part thereof is *true*; nor that the said *H. Guy*, or any other person or persons than the defendants, ever *wrote or printed*, &c. those matters or any part thereof: nor have they, the defendants, in or by that plea denied that before the composing or publishing the said libels in those counts respectively mentioned, or either of them, the conduct of the plaintiffs respecting the said accounts, &c. was explained and justified to the said *H. Guy*, and that he was satisfied therewith, and reposed his esteem and confidence in them, and continued to deal with and employ them in their said trade, and that they, the defendants, *had notice* thereof: and also for that the matters contained in that plea do not amount to any traverse or denial of the said first and second counts,

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counts, but are consistent therewith : neither do those matters contain any justification or excuse of the malice or misconduct of the defendants, or of the causes of action, &c. Also, that the matter thereby attempted to be put in issue is immaterial and irrelevant, &c. Similar cases of demurrer were assigned to the third plea.

Abbott, in support of the demurrers, contended, 1st, That no person could justify the publishing in *print or writing*, slanderous words *spoken* of another, although he named the speaker. But, 2dly, if he could, he must at any rate publish the exact words, and not take upon himself to judge of the import and effect of them. 3dly, (which applied only to the demurrers to the pleas to the two first counts) That in no case could the publication of slanderous words spoken by another be justified after the publisher knew that the person who uttered the slander was convinced of his mistake. 1. There is a great difference between the malignity and injurious consequences of slanderous words *spoken* and *written*; the one is sudden and fleeting, the other is permanent, more deliberate, and more widely disseminated. This distinction is recognized in the books; for many words, which, if spoken, would not be actionable, are actionable if written; as in *Bell v. Stone* (a), where many cases to that purpose are collected; *Austin v. Culpepper* (b), *Harman v. Delany* (c), *King v. Lake* (d), *Fillers v. Mousley* (e), and *Janson v. Stewart* (f). But it will be said that it is the same whether the slander were all spoken or all written; and that no action will lie in either case, if the original author of it were named at the time; and Lord *Northampton's* case (g), may be relied on for this purpose; but that was not the point in judgment; for ultimately all the defendants there were punished. The case of *Crawford v. Middleton* (h), is to be sure in point; but *Twisden, J.* differed from the rest of the Court; and his opinion is the more entitled to weight; for certainly it was not necessary, as the three other Judges supposed, to allege in the declaration, by way of negative, that the defendant had not met any person on the road who had told him the slanderous words imputed. The case of *Davis v. Lewis* (i)

(a) 1 *Bos. & Pull.* 331.

(b) *Skin.* 124, and 2 *Show.* 513.

(c) 2 *Stra.* 899, and *Fitzg.* 255.

(d) *Hardr.* 470, 1 *Saund.* 120.

(e) 2 *Wils.* 403.

(f) 1 *Term Rep.* 748.

(g) 12 *Co.* 134.

(h) 1 *Lev.* 82.

(i) 7 *Term Rep.* 17.

only decides the converse of the proposition, that as the defendant did not, at the time of repeating the slander, name the party who uttered it to him, it was not sufficient to name him in his plea. Sound policy is against the admission, much more the extension of this kind of justification; for every repetition of a slander is a new injury, and sometimes is an aggravation of the first; as, if the occasion be more public, or the slanderer a person of greater weight. By the rule of the civil law, every publisher of slander was punishable as the original author. *Codex, lib. 9, tit. 36, 2.* At any rate, however, the party justifying must take care to publish, if at all, the exact words of the original author of the slander, and not what he is pleased to call *the purport and effect* of the slanderous words. In actions for slander, and indictments for libels, as well as in justificatory pleas of this sort, it is always usual to state the words themselves, and not the effect of them; for otherwise the party pleading makes himself a judge for the purport and effect, which the law does not admit. The very reason why the second speaker is excusable in any case is, because he gives to the party injured a certain cause of action against the original speaker; but that is not the case here; for if the plaintiff were to charge the first speaker in an action of slander, and only allege in his declaration that he had spoken such and such words, *or to that effect*,—that would not sustain the action: neither would it suffice if the words were stated without that addition, if the present defendants, when called as witnesses, could only prove what they have in their plea here alleged. For though it be not necessary to prove all the very words which are laid, yet some certain words must be proved, agreeing in substance with the words laid. But, 3dly, no person is allowed to publish the hasty slander of another, after he knows that the person who first uttered it is convinced that he was mistaken. This is specially charged against the defendants in the first count, and is the gist of that count, and must be proved by the plaintiffs: otherwise, under the general issue the defendants will be intitled to a verdict: the special plea to it therefore amounts to no more than the general issue. In *Gerard v. Dickenson (a)*, it was holden, That slander spoken by the defendant against his own knowledge made him liable at all events.

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(a) 4 Co. 13 b.

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Holroyd, contrà, said he should first consider the special plea to the 3d count; because if that were not good, of course the others could not be maintained. To maintain an *action* for slander, the words spoken or written must be *false* as well as malicious. This was so settled in Lord *Northampton's* case (a), and all the subsequent cases. The fourth point there resolved was, that in a private action for slander, if *J. S.* publish that he hath heard *J. N.* say that *J. G.* was a traitor or thief, in an action on the case, if the truth be such, he may justify. The same was considered in *Davis v. Lewis* (b). But it is attempted to distinguish this from other cases, because the defendants published *in writing* that which before was only *spoken*. Admitting, however, that there may be a distinction in the respect stated, namely, where the words were not actionable before they were reduced into writing, that distinction does not apply here; because the words in question having been spoken of the plaintiffs in their trade, were in themselves actionable, as much so as if they had been originally written. And as to the greater mischief of written than of parol slander, the law has provided an additional remedy for it, namely, by indictment. Neither does the mere stating that another person said such and such things of the plaintiffs give any confirmation of or authenticity to the slander, as it must still stand upon the authority of the original propagator of it. Nor is any special damage charged to have ensued from it. Therefore, all that the defendants said being true, and no special damage being stated, no action lies, there being neither *dammum* nor *injuria*. [Lord *Ellenborough* desired that he would endeavour to answer the objection, which pressed chiefly on the attention of the Court, that on the information as disclosed by the pleas, the plaintiffs could not have maintained an action against *Guy* for the slander.] The usual way to be sure in declaring in these actions is to state that the defendant spoke such and such words; but it has never been holden necessary to prove every identical word as laid: proving the substance of them is sufficient. It is so in the case of libels; though there, if the party affect to set out the very words, he must prove them. Here the words themselves are given, though the defendants have also added, *or to that effect*. But it would be sufficient for the plaintiffs to declare on those words against *Guy*, though they could only prove words to the same effect.

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(a) 12 Co. 133.

(b) 7 Term Rep. 17.

[*Lawrence*,

[*Lawrence, J.* Though it be not necessary to prove all the very words alleged, yet it is necessary to prove some material part of them; and it would not be sufficient to prove equivalent words of slander.] The demurrer admits the words justified to be substantially the same as those spoken. With respect to the justification pleaded to the first and second counts, admitting that an action lies for publishing slander originally uttered by another after knowledge by the defendant that it was untrue, yet that is no cause of demurrer to the justification pleaded; but such previous knowledge should have been specially replied, in order to shew that the plaintiffs meant to rely on it; because, as it is stated in the declaration, it is mere matter of aggravation, and need not have been proved; the gist of the action not being the knowledge, but the falsely and maliciously publishing the libel. As where to an action for a voluntary escape, the defendant may plead a recaption as if in case of a negligent escape; and if the plaintiff mean to rely on the *voluntary* escape, he must reply it specially; because the actual *escape* is the gist of the complaint, and the allegation in the declaration, of its being *voluntary*, is only to be taken as matter of aggravation, unless the plaintiff by his replication shew that he insists on it as a substantive cause of action (*a*). So in an action on a bond, in which the condition is stated and breaches assigned in the declaration, yet if the defendant plead performance, it has never been holden that the plaintiff must not insist on the breaches in his replication. So in an action of trespass for impounding cattle and converting them to the defendant's use, the conversion is not the gist of the complaint, though it may become so by the replication; and the conversion need not be answered by the plea (*b*). Here it would have been sufficient, on the plea of the general issue to the first count, for the plaintiffs to have proved the publication, without any of the previous circumstances in aggravation. And if a special plea select a fact not material to maintain the declaration, and put that in issue, it is demurrable.

Abbott, in reply, insisted that the plaintiffs could only sustain the two first counts, by proving the several matters alleged therein, prior to the publication, which, as there stated, grew out

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(*a*) Sir *R. Bony's* case, 1 *Ventr.* 217. and vide *Bonafous v. Walker*, 2 *Term Rep.* 126.

(*b*) *Dye v. Leatherdale*, 3 *Wils.* 20.

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of such previous matter, and was inseparably connected therewith. The libel is charged to have been published of and concerning *the said account so made out and sent to the said Guy*, and of and concerning the *said Guy*, and the *aforesaid* expressions so by him uttered, &c. which expressions are before stated to have been uttered hastily and rashly, and the matter to have been explained to *Guy's* satisfaction, and this with the knowledge of the defendants before the publication of the libel. The plea does not allege that the words spoken by *Guy* were true, but only that in fact he had uttered such words, *or to that effect*: therefore, unless it would be sufficient for the plaintiffs to declare in that manner against *Guy*, the defendants have not given them a certain cause of action over by their plea; and it must be taken that the defendants, when called as witnesses in such action, could prove no otherwise than as they have pleaded, which would not be sufficient. But at any rate, there is a great difference between written and oral slander: and, for the reasons before given, the rule laid down in Lord *Northampton's* case does not apply to the present.

Lord ELLENBOROUGH, C. J. Without considering the extent of the rule laid down in Lord *Northampton's* case, of which it is sufficient at present to observe that that was a case of oral, and this is one of written slander, the ground on which we are disposed to decide the present question steers clear of that and all other cases. In order to maintain this species of action, it is unnecessary that there should be malice in the defendant and an injury to the plaintiff, and that the words should be untrue. By the first count the charge in substance against the defendants is, that they revived and published an injurious report of the plaintiffs, which had been made by another person, who was afterwards convinced that he had uttered the words hastily and rashly: and that the defendants did this with full knowledge of all those circumstances. All the several allegations of the previous report, the subsequent explanation of the plaintiff's conduct to *Guy*, his satisfaction with it, and the defendant's knowledge of it, are so interwoven by the pleading with the publication of the libel, that they could not be severed from it: so that the plaintiffs could sustain that count by proof of the publication alone of the libel without such explanatory circumstances. The plaintiffs could not entitle themselves to recover on it unless all were proved. The count then contains a charge

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against the defendants that they published the slander with a knowledge that the person who had originally uttered it was satisfied that it was untrue. The fact therefore of such previous uttering was merely used by the defendants as a pretence for publishing the same slander: that shews malice in the defendants, and an injury to the plaintiffs. But without going into that point, at all events, in order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiffs a certain cause of action against the party named: now here they only state that the other uttered such words, *or to that effect*; and if the defendants when called as witnesses to support the action against *Guy*, could only prove that he uttered words *to the effect* of those set forth, that would not be sufficient. On this ground alone, without going into the other objection, it is enough for us to say that the justification cannot be supported.

LAWRENCE, J. (a) I am of the same opinion on the ground stated by my Lord, without going into Lord *Northampton's* case as applied to written slander. And without considering whether or not it be necessary to prove all the previous allegations in the two first counts, it is sufficient to say, according to the rule in Lord *Northampton's* case, supported in the late case of *Davis v. Lewis*, 7 *Term Rep.* 17. that in order to justify the repetition of slanderous words spoken by another, the defendant must give a certain cause of action against that other, and that must be done not only by naming the author of the slander, but also by giving the very words used: and it is not sufficient either to state words to the same effect, or to prove words to the effect of those alleged. For I take the rule in actions of this sort to be, that though the plaintiff need not prove *all* the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander.

LE BLANC, J. Without entering into the consideration of Lord *Northampton's* case, the rule is clearly established, that in order to justify the repetition of slander, the defendant must state the name of the person by whom it was first uttered, so as to furnish the plaintiff with a cause of action against him. But this rule would be nugatory if the defendant were merely to

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(a) *Grose, J.* was absent, through indisposition.

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name the person without also stating what he had uttered with such precision as to enable the plaintiff to maintain his action against him. For this purpose the defendant must state the very words themselves used, and not merely the effect of them. With respect to the two first counts, they state circumstances which shew that though the defendants only published slander which had before been uttered by another person named, yet that it was published by the defendants under such circumstances as do not appear to me to come within any of the cases where such previous uttering has been holden to be a justification to another by whom it was revived.

Judgment for the Plaintiffs.

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SAMPSON *against* BROWN and Another.

A writ of error allowed, though not returned, is in itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid proceedings against them in scire facias upon the recognizance of bail, prosecuted after a return by the sheriff of non est inventus made pending such writ of error.

THE plaintiff declared as of *Hil. 42 Geo. 3.* in scire facias against the defendants as bail of one *John Mac Guire*, and stated the first writ against the principal to be tested the 25th *June, 41 Geo. 3.* returnable on *Friday* next after the morrow of *All Souls*, to which *nihil* was returned; and then stated a second writ returnable on *Thursday*, on the morrow of *St. Martin*; to which another *nihil* was returned: and thereupon the plaintiff prayed execution to be adjudged to him of the debt and damages, according to the form of the recognizance of bail.

Plea, that after the judgment against *Mac Guire* a writ of capias ad satisfaciendum issued against him, directed to the sheriff, returnable on *Wednesday* next after 15 days of the *Holy Trinity*, and that *before the same was returnable or returned*, viz. on 15th *June* 1801, a writ of error was duly issued out of Chancery directed to Lord *Kenyon*, the then Lord Chief Justice of B. R., commanding him that the record and proceedings of the said suit and judgment (against the principal) should be brought before the Justices of C. B. and Barons of the Exchequer in the Exchequer Chamber on *Tuesday* the 23d *June* 1801, according to the form of the statute, &c. *as by the said writ of error now remaining with the proper officer of B. R.* in that behalf not yet returned by the said Chief Justice more fully appears; which said writ of error afterwards and before the said writ or any writ of capias ad satisfaciendum on the said judgment against *Mac Guire* was returned or returnable, viz. on 16th

16th *June* 1801, was *duly allowed*, &c. according to the course and practice of the said Court. The plea then averred that the said writ of ca. sa. so issued against *Mac Guire*, viz. on the 19th of *June* 1801, was returned by the Sheriff pending the said writ of error, and whilst the same was in full force and effect, and during the time that the said writ of error was a supersedeas to the said ca. sa. upon the said judgment, and wholly superseded the execution of any such writ. And that *Mac Guire*, after giving the said judgment, and before the issuing of any other ca. sa. against him, viz. on 16th *November* 1801, surrendered himself, &c. in satisfaction of the judgment and in discharge of his bail, &c.

Replication; that on *Tuesday* next after the octave of *St. Martin*, 42 *Geo.* 3. a certain rule or order was applied for by the defendant, and was made by the said Court of B. R. whereby on reading the affidavit of *W. M.* it was ordered that the plaintiff should on *Friday* next after 15 days of *St. Martin* then next, shew cause why all proceedings against the bail of *Mac Guire* should not be set aside for irregularity; it then stated that the said affidavit of *W. M.* set forth the several matters in the defendant's plea alleged, touching the issuing and return of the said ca. sa. and the issuing and allowance of the said writ of error; and that such proceedings were had on the said rule that afterwards, viz. on *Saturday* next after 15 days of *St. Martin*, cause was shewn on behalf of the plaintiff, and the rule was discharged, &c.

To this there was a demurrer, shewing for special causes, amongst others, that it does not appear by the replication that the said rules or orders therein alleged to be made, were made in the said cause now depending on the said recognizance. There were several other causes assigned: but as it was admitted that the replication was bad, and the whole argument turned on the validity of the plea, it is unnecessary to state the rest, which applied to parts of the replication not herein set out *verbatim*.

Wigley, in support (of the demurrer to the replication, and) of the plea, contended that the allowance of a writ of error operated as an absolute supersedeas in law, so as to avoid any further proceeding, without any express notice to the plaintiff below not to proceed, 2 *Roll. Abr.* 492. l. 10. *Smith v. Cave* (a),

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Perkins v. Woolaston (a), *Sweetapple v. Goodfellow (b)*, *Smith v. Nicholson (c)*, *Dudley v. Stokes (d)*, *Perry v. Campbell (e)*, *Benwell v. Black (f)*, and *Miller v. Newbald (g)*; so that even a return of *non est inventus* by the sheriff (after a writ of error allowed) to a capias issued before is a nullity: for, as it is said, the sheriff cannot even look after the defendant to ground such a return upon. Though in *Miller v. Newbald* the Court said they sometimes refused on summary application to stay proceedings pending a writ of error, leaving the party to his ordinary remedy. Whatever may have been formerly practised, it is no longer required, if it ever were, to sue out a writ of superseas upon the allowance of the writ of error: and the only instances where it has been done in modern times have been where a defendant having been taken in execution could not get his discharge without it. But here the writ not having been executed, there was nothing to supersede. These defendants too (the bail) were no parties to the original suit, and have no notice of the default of the principal till after the return to the capias. But the capias must be *returnable* before the issuing of the *scire facias* against the bail, though no issue can be taken on the time when it was in fact returned (*h*). And though it had been competent to them to have sued out a writ of superseas, at least it was a matter of discretion which they were not bound to do.

Marryat, contra. This is an attempt to plead matter of practice which is not allowable. In a case of *Carmichael v. Troutbeck* and another, bail of *Chandler*, in *Easter Term 1784*, to an action by the assignee of the bail bond, it was pleaded that the cause was out of Court for want of a declaration before the assignment; and on demurrer the Court held, that as a matter of practice it was not pleadable: and thereupon the plaintiff had judgment. Now the return of the capias is mere matter of practice, as appears from *Ball v. Manu captors of Russel (i)*. Even the issuing of the writ of capias *ad satisfaciendum* against the principal, is with respect to the bail only matter of practice not required by any law, and merely intended to give the bail

(a) 1 *Salk.* 321.

(c) *Ibid.* 1126. and 2 *Ld. Raym.* 1266.

(e) 3 *Term Rep.* 390.

(g) *Ante*, 1 vol. 662, and vide *Meriton v. Stevens*. *Willes*, 271.

(h) 3 *Term Rep.* 390.

(b) 2 *Str.* 867.

(d) 2 *Blac. Rep.* 1183.

(f) *Ibid.* 643.

(i) *Salk.* 602.

notice to render the principal. There is no instance of the allowance of a writ of error (by way of supersedeas) being put on the record by plea, although the occasion must continually have occurred. It is the daily practice to apply to the Court to stay proceedings pending a writ of error, which is sometimes refused if it appear to have been sued out for delay; and sometimes plaintiffs obtain leave to sue out execution pending a writ of error. In all these cases, if this plea be good, the Court would be authorizing a trespass. Neither would such applications for stay of proceedings be made, since a plaintiff would be a trespasser if he proceeded at all after the allowance of a writ of error. This shews that such allowance operating as a supersedeas is merely founded on the practice of the Court, and not on any general rule of law. Here the writ of error was not allowed till after the issuing of the *capias*, and the objection is that the sheriff afterwards returned the writ, which it was his duty to do unless prohibited by some other equivalent authority. But no notice is stated to the sheriff of such allowance; and he was not bound to take judicial notice of it, however the party in the cause may be so; though even after notice the sheriff may return to the Court that he has done nothing under the writ. And according to *Hurst v. Cox* (a), the return and filing of the *capias* is mere matter of form; and by *Gee v. Fane* (b), the return may be filed even after the issuing of the *scire facias*. At any rate the allowance of the writ of error is not of itself a supersedeas, but only becomes so by a rule of Court or by a writ of supersedeas. He then referred to *Rast*, 309, *pl.* 4. and *Clift*, 693, *pl.* 20. Precedents of writs of supersedeas to the sheriff on the ground of a writ of error allowed. *Brev. Jud.* 341. *Fitzh. Na. Br.* 239. *E. Reg.* 129. and many other precedents referred to in *Townsend's tables*. So the stat. 3 *Jac.* 1. c. 8. requiring bail in error recognizes the practice of issuing writs of supersedeas. [Lord *Ellenborough*. The words of that statute are "that no execution shall be stayed upon or by any writ of error or supersedeas thereupon to be sued, &c. unless," &c.; which shew that the Legislature recognized the staying of proceedings as well by the allowance of the writ of error itself as by the writ of supersedeas.] The writ of error allowed may stay the issuing of

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(a) 1 *Blac.* 593.(b) 1 *Lev.* 225.

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the writ of execution; but after the latter has issued, the writ of supersedeas is necessary to stay the execution and prevent the sheriff doing any thing under it. In the case cited from 2 *Rol. Abr.* 492, it appears that a writ of supersedeas issued after the writ of error to enforce the stay of proceedings. At any rate, as a writ of error does not of itself stay the proceedings in all cases, as in those included in the statute of *James*, unless *bail in error* be put in, it ought either to have been shewn that this was not a case in which bail in error were required, or to have been averred that bail in error had been put in, in order to make it operate as a supersedeas. And as the party has four days by the practice of the Court to put in such bail, at least the proceedings during those four days until the bail were put in are good. In *Lane v. Bacchus (a)*, where the writ of execution was executed after the allowance of a writ of error before the four days were expired, and no bail in error were put in, the Court refused to set aside the execution. Besides, there is a great difference between the award of a writ and the actual execution of a writ awarded. *Bro. Abr. Error, pl.* 66. Here the record has never been removed; it is expressly so stated in the plea: and the writ of error being discontinued by lapse of time, there is nothing to prevent the Court from awarding execution.

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LORD ELLENBOROUGH, C. J. It seems from the passage cited from *Bro. Abr.* to have been anciently the practice to sue out a writ of supersedeas, after the allowance of a writ of error: but I find no instance of this practice referred to since the stat. 3 *Jac.* 1. c. 8.; and indeed from that period, at least, it must have been altogether unnecessary: for that statute says, "That no execution shall be stayed upon, or by any writ of error or supersedeas thereupon to be sued, &c. unless," &c. which shews that either a writ of error (allowed) or a writ of supersedeas would have the effect of staying execution. That tallies with the practice which has long prevailed, of not suing out a writ of supersedeas after the allowance of a writ of error. And the case of *Perry v. Campbell*, 3 *Term Rep.* 390, shews that Lord *Kenyon* then expressly considered that the allowance and service of the writ of error was, in itself, a supersedeas. Shall we then overturn the whole practice of the Court, by

(a) 2 *Term Rep.* 44.

saying that it shall not have that operation, but that it is necessary to sue out a formal writ of supersedeas, which, it appears, is never done? Here the bail, by their plea in effect, allege that no *capias ad satisfaciendum* was returned against their principal; without which they cannot be made liable. Then it is said that the allowance of the writ of error is no supersedeas, unless it be shewn that bail in error were put in in time, or that none were required. But if bail in error were not put in when required, that should have been shewn by the plaintiff in his replication; for, as it appears, the writ of error allowed, is, in general, a supersedeas; and the statute only says, that it shall not be so in certain cases, unless, &c.: therefore the party wishing to avail himself of the neglect in the particular case excepted, should shew that.

LAWRENCE, J. (a) said he had always considered that the allowance of a writ of error was a supersedeas, and referred to *Salk.* 321. and *Cotton v. Daintry*, 1 *Ventr.* 31.; which latter had not been mentioned in the argument: where it is said, that though the sheriff shall not be in contempt if he make execution after the writ of error, if no supersedeas be sued out, for that he had no notice; yet the writ of error, immediately upon the sealing, forecloses the Court, so that the execution made after it is to be undone.

LE BLANC, J. declared himself of the same opinion.

Judgment for the Defendant.

(a) *Grose, J.* absent from indisposition.

WILLIAMSON *against* ALLISON.

Friday,
June 25th.

THE declaration stated that the plaintiff, on the 12th of May 1800, at London, &c. bargained with the defendant to buy of him twenty-four dozen bottles of claret, for the purpose of being forthwith exported by the plaintiff to the *East Indies*; and the defendant then and there, well knowing the said claret to be in an unfit and improper state to be so exported, as aforesaid, by then and there *falsely and fraudulently warranting* the said claret to be in a fit and proper state to be so exported, as aforesaid, then and there *falsely, fraudulently, and deceitfully* sold the claret at and for a certain sum, viz. 78*l.* to

In an action on the case in tort for a breach of a warranty for goods, the *scienter* need not be charged, nor if charged need it be proved.

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be therefore paid, and which was afterwards paid to the defendant for the same; and which claret was afterwards exported in bottles by the plaintiff to the *East Indies* aforesaid; whereas, in truth and in fact, the said claret so as aforesaid sold by the defendant to the plaintiff, and so exported as aforesaid, at the time of the said sale and warranty thereof, was not in a fit and proper state to be so exported, but on the contrary, was at that time new, and in an unfit and improper state to be so exported; whereby the said claret fermented, and great part thereof became wholly lost to the plaintiff, and the rest of little or no value; and by means of the premises, the plaintiff lost great gains and profits which he would otherwise have made, &c. and was put to great charge and expence about the exporting and insurance thereof; to wit, at *London*, &c. and so the plaintiff in fact saith, that the defendant on the same day and year aforesaid, *falsely and fraudulently deceived him*, to wit, at *London*, &c. There were other counts, all charging the *scienter*, and the *deceit*: to which the defendant pleaded not guilty.

At the trial before *Lawrence, J.* at the Sittings after last *Hilary Term* at *Guildhall*, the warranty was proved, and also that the wine, when it got to *Bengal*, was sour and unmarketable; but the plaintiff did not prove, nor did it appear probable, from the evidence, that the defendant knew that the wine was unsound at the time when it was delivered; but the misfortune was more likely owing to bad bottling or packing. It was therefore contended on the part of the defendant, that the plaintiff was not entitled to recover, inasmuch as there was no proof of the *scienter*, as laid in the declaration: but the learned judge being of opinion that the gist of the action was the warranty, and the *scienter* mere matter of aggravation, thought that the latter need not be proved, and directed the Jury accordingly, who found for the plaintiff.

[448] In the last Term a rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground before suggested: and on reporting the evidence on this day, *Lawrence, J.* referred to a case of — *v. Purchase* at *Guildhall*, 6 *Geo. 2.*, before *Lord Raymond, C. J.* which was an action on the case for selling an unsound horse which was warranted to be sound: in which the *scienter* was averred in the declaration. But *Lord Raymond* was

was of opinion that the *scienter* need not be proved, inasmuch as there was a warranty; and that the *scienter* was only necessary to be proved where the action was in the nature of an action of deceit without any warranty (a). He observed, however, that it did not appear from the note of that case, whether the declaration were in assumpsit or in tort; though he thought it more probable that it was in tort; as the practice of declaring in assumpsit in such cases was not common at that time.

Gibbs and *Dampier*, who were to have shewn cause against the rule, were stopped by the Court.

Erskine and *Marryat*, in support of the rule, said, that unless the declaration in the case alluded to were in tort, the authority of it did not press upon the defendant: and in *Stewart v. Wilkins* (b), where this subject was much discussed, the practice of declaring in assumpsit in such cases was not considered as a novelty, it having been in use some time before, within the recollection of two of the judges (*Ashhurst* and *Baller*, Js.) who were considerable pleaders. In assumpsit

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(a) Vide *Springwell v. Allen*, *Alcyn*, 91, of which the following is a fuller note taken from a MS. in the hand-writing of Mr. Justice Burnet, in the collection of Lord Hardwicke, C. and his son the late Mr. Charles Yorke. "In an action on the case for selling a horse as the defendant's own, when in truth it was the horse of A. B., upon not guilty pleaded, it appeared that the defendant bought the horse in Smithfield, but did not take care to have him legally tolled. Yet as the plaintiff could not prove that the defendant knew it to be the horse of A. B. the plaintiff was nonsuited; for the *scienter* or *fraud* is the gist of the action where there is no warranty; for there the party takes upon himself the knowledge of the title to the horse and of his qualities." See also *Chandler v. Lopus*, in the Exchequer Chamber, *Cro. Jac.* 1. to the same purpose. The same MS. also refers to another case; "So if a man sell six blank lottery tickets, and afterwards another as owner of these tickets recover them of the vendee; unless the vendor knew them to be the property of another, or warranted them, neither this action (under title Case of Torts in nature of Deceit and other Wrongs) nor assumpsit for money had and received to the vendee's use will lie. Per Holt, C. J. *Paget v. Wilkinson*, Tr. 3 W. 3. Guildhall." And see *Denison v. Rolphson*, 1 *Ventr.* 366, where an opinion is given on the very point in question; for, on the second count, which stated a warranty that the goods sold were good and merchantable, and averred that the defendant delivered them bad and not merchantable, knowing them to be naught; the Court observe that though the declaration be "knowing them to be naught," yet the knowledge need not be proved in evidence.

(b) *Dougl.* 13.

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upon an express warranty, the *scienter* is immaterial and irrelevant, and therefore need not be proved though laid. But in declaring in case for the deceit, though it may not be necessary where a warranty is stated to aver the *scienter*, according to *Chandler v. Lopus* (a), yet not being irrelevant to the deceit, which is there the gist of the action, it must be proved if laid. Here then the plaintiff having declared in tort, and having averred the *scienter*, which is the medium of establishing the fraud and tort, was bound to prove it. The issue of *not guilty* is joined on the deceit, and not on the assumpsit or warranty: the deceit, therefore, is not merely not irrelevant, but of the very essence of the declaration. They also referred to a late case of *Dowding v. Mortimer*, before Lord Kenyon, C. J. where he was of opinion that the *scienter* was necessary to be proved (b).

Of this last-mentioned case it was observed by the plaintiff's counsel in answer, that it did not state any warranty, but was founded wholly on the deceit.

LORD ELLENBOROUGH, C. J. The distinction between immaterial and irrelevant averments was well taken in *Bristow v. Wright* (c). That was an action on the case against a sheriff for taking the tenant's goods in execution without satisfying the landlord for a year's rent; and the plaintiff averred that the rent was reserved *quarterly*; whereas it turned out to be reserved yearly. There, if the whole averment as to the reservation of the rent had been struck out, the plaintiff could not have maintained his action, because some rent must necessarily

(a) *Bull. N. P.* 51, cited from *Cro. Jac.* 4.

(b) *Dowding v. Mortimer*. The declaration stated that the plaintiff, on 28th Jan. 1798, at, &c. bargained with the defendant to buy of him a certain musket as and for a sound and perfect musket, at and for a large price, viz. 2*l.* 12*s.* 6*d.* and that the defendant then and there knowing the said musket to be unsound, broken, and imperfect, then and there sold the said musket to the plaintiff as and for a sound and perfect musket at and for a large price, to wit, 2*l.* 12*s.* 6*d.* then and there paid by the plaintiff to the defendant; which said musket so sold as aforesaid was then and there at the said time of the sale thereof unsound, broken, and imperfect; and by means and in consequence thereof the said musket became and was of little or no use or value to the plaintiff, to wit, at, &c. and so the plaintiff in fact says that the defendant on the day and year aforesaid falsely and fraudulently deceived the plaintiff, to wit, at, &c. There were other counts to the like effect. Plea not guilty.

(c) *Dougl.* 665.

have been averred to be due; and though it was unnecessary to have stated it to be reserved quarterly, yet the defendant was entitled * to avail himself of the defect of proof in that particular. But here if the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect. The ancient method of declaring was in tort on the warranty broken, and that was just going out of general practice when the case of *Steuart v. Wilkins* was discussed, because it was found more convenient to declare in assumpsit for the sake of adding the money counts. So general was the former method, that declarations in that form were familiar in every arrangement of precedents in tort. And the more modern practice of declaring in assumpsit in these cases has not prevailed generally above forty years. No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it. Here then the plaintiff will be equally entitled to recover in the tort upon the same proof, by striking out the whole averment of the *scienter*.

LAWRENCE, J. I retain my former opinion that the *scienter* was not necessary to be proved. The form of declaring in assumpsit in these cases is not of very ancient date, though Mr. Justice *Butler*, and before him Mr. Justice *Ashhurst*, have often drawn declarations in that way in the course of their practice of pleadings. The case of *Steuart v. Wilkins* was the first wherein the question was regularly discussed, and that mode of declaring established; but even since that time I have myself drawn a hundred declarations on the same subject in tort. There are many precedents of that sort in the books, where a warranty is stated. *Clift. Entr.* 934. 4, 5, 6, and several others in the same book. *Thomp.* 40. 20. And these are not drawn as laying the gravamen on the deceit, as in the case alluded to of

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Dowding v. Mortimer, but on the warranty broken. Therefore, considering what has been the common practice of pleading, till of late years, I think it very probable that in the case before Lord *Raymond*, the declaration was in tort, and if so, it would be directly in point. With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action: for then, though the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover. This distinction was taken by Mr. Justice *Buller* in *Pippin v. Solomon*, 5 *Term Rep.* 496; where he takes notice of the case of *Bristow v. Wright*, and observes that it was there necessary for the plaintiff, in shewing that he was landlord, to set forth a contract between himself and the tenant, and that no part of the contract alleged could be struck out, being in its nature entire, and necessary to be proved as alleged. But in the principal case he said, that the averment (which was that the ship sailed *after* the making of the policy declared on) did not arise out of the contract, nor was the contract, as alleged, made to depend upon it; and that if the averment there in question had been altogether omitted, the declaration would still have continued a perfect cause of action. So here if the *scienter* be struck out altogether, the plaintiff may still maintain his action in tort on the warranty broken.

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LE BLANC, J. The insertion or omission of the fact of the defendant's knowledge at the time, that the wine was unfit for sale, according to the warranty, makes no difference in the cause of action declared on, and therefore it may be struck out altogether: but in another form of declaring it may be made material.

Rule discharged.

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Saturday,
June 26th.IMLAY *against* ELLEFSEN.

THE defendant, by leave of a judge at chambers, was holden to special bail upon the following affidavit:

“*Robert Cowie* of, &c. one of the trustees of the estate and effects of *G. Imlay*, under an assignment thereof in trust for his creditors, maketh oath and saith, that *P. Ellefsen* is justly and truly indebted to the plaintiff in 3000*l.* and upwards, being the value of certain bars of silver, containing 13000 ounces or thereabouts, delivered by the plaintiff or on his account, in the year 1794, to the defendant, to be by him carried and delivered, and by the defendant undertaking to be carried and delivered to *E. B.* of *Gottenburgh*, in *Sweden*, for the use and on the account of the plaintiff; but which bars of silver, or any part thereof, the defendant hath not carried or delivered to the said *E. B.* at *G.* aforesaid, or to any other person or place for the use of the plaintiff. And this deponent further saith, that the said defendant hath ever since the receipt by him of the said goods, to this deponent’s belief, been absent from *England*, and out of the jurisdiction of the Courts of justice here, and hath lately come to *England*, but secrets himself for fear of discovery. And further, &c. that the defendant is a foreigner, residing in *Norway*, and is come to *England* for an occasional purpose only, and as deponent believes, will shortly depart this realm; and that unless he shall be holden to bail, the plaintiff will be deprived of his legal remedy, &c.

Erskine, in support of a rule for discharging the defendant on common bail, objected first to the sufficiency of the affidavit to hold to bail, that it did not state any debt (*a*) owing from the defendant to the plaintiff, but at most only a misconduct of the former in not carrying the goods according to his undertaking. No perjury could be assigned if in fact the silver were the property of *E. B.* and he alone were interested in the loss: for there is no averment that the plaintiff had any property in it, or was damaged by the non-delivery: and an argumentative af-

No counter affidavit can be received in *B. R.* in order to contradict or do away the effect of an affidavit to hold to bail on the merits: and though such counter affidavit might be received to

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shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country; at least where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. If a defendant be holden to bail under a judge’s order upon an affidavit disclosing circumstances which shew that the plaintiff has been

damified to such an amount, it is sufficient, though it improperly state that the defendant was indebted to that amount, and disclose the special circumstances.

(a) Vide *Walley v. Thomas*, 7 *Term Rep.* 550.

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fidavit of debt or damage is not sufficient for holding another to bail. But, 2dly, he relied on a counter affidavit by the defendant, whereby it appeared that the contract in question was made in *France*, for the transmission of the silver from thence, at a period when that was prohibited to be done by the laws of that country; and also that the defendant had been holden to bail by the plaintiff for the same cause of action in *Norway*; which suit was still depending. In support of the first of these latter grounds of objection, he relied on *Melan v. The Duke of Fitzjames* (a), where the Court of C. B. held that they were bound to take notice, when brought before them, of the law of the country where a contract was made, and by which its legality was to be judged. [But Lord *Ellenborough* signifying his dissent from that determination, which he observes was opposed by one (b) of the learned Judges of the Court at that time, *Erskine* abandoned that point.] He then relied on the pendency of the suit in *Norway*, on which the defendant had given bail; and observed, that though by the general rule of the Court no counter affidavit could be read against an affidavit to hold to bail; yet there were some necessary exceptions, of which this was one. For it could not be denied that the fact of the defendant's having been before holden to bail for the same cause of action in the courts of this country, might be brought before the Court by counter affidavit, and on the same ground of reason the fact now in question. The like was in daily practice in case of the arrest of married women, who, after having been holden to special bail, were discharged on counter affidavits.

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Garrow and *W. Walton* shewed cause against the rule, and objected altogether to the reception of the counter affidavit of the defendant, as being contrary to the established practice of this Court, though admitted by C. B.: that it was in effect trying the merits of the cause on affidavit, and that too upon the deposition of the defendant himself. With regard to the objections arising on the face of the affidavit to hold to bail, they answered, that it was first positively stated that the defendant was indebted to the plaintiff in 3000*l.* and it was afterwards shewn how the demand arose. And they referred to *Emerson v. Hawkins* (c) and *Kirk v. Strickland* (d), and observed that the defendant having been holden to bail, by leave of a judge, who

(a) 1 *Bos. & Pull.* 133.

(c) 1 *Wils.* 335.

(b) *Heath, J.*

(d) *Dougl.* 449.

had exercised his discretion on all the circumstances of the case under the statute, the Court would be less inclined to interfere than in common cases, where a plaintiff by his own discretionary acts sets in motion the bailable process.

LORD ELLENBOROUGH, C. J. This is an application to the discretion of the Court: and to be sure it would have been competent to the defendant to have shewn that he had been before holden to bail in this country for the same cause of action; because no man ought to be twice vexed for the same cause. But the question here is, whether we have presented to us with sufficient distinctness that the defendant stands in the situation of having been holden to bail in *Norway*, so that the plaintiff has the same security for his demand, and might have all the benefit of prosecuting his suit there which he has here. And as we do not see that such is the case, we do not feel ourselves warranted in taking from him the benefit he is entitled to from the laws of this country. Not knowing what the laws of *Norway* are in this respect, I cannot say that the plaintiff would have the same benefit from what has taken place there as he will have by the present proceeding. Then the question is on the conclusiveness of the affidavit to hold to bail as to the merits: and if that had not been already expressly decided in this Court in the case of *Emerson v. Hawkins* (a), and in *Smith v. Fraser* (b), where the Court refused to hear a counter affidavit read, I think the rule of practice of this Court is of such preponderating convenience that we ought to make such a rule in future: for otherwise we should have to try the merits of every case on affidavit, and it would be holding out great encouragement to defendants to commit perjury in relief of themselves from special bail. And this rule is as applicable and the mischief the same where a defendant has been holden to bail by a judge's order, as in ordinary cases under the statute where a debt is positively sworn to. With respect to the objections taken to the affidavit itself, on which the defendant has been holden to bail, the deponent might indeed have used more proper terms to signify his damnification than by stating that the defendant was *indebted* to the plaintiff in so much; though the word *indebted* seems to have been used only to express the amount of the damnification, the manner of which is afterwards stated. However, if the real fact be con-

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(a) 1 Wils. 335.

(b) 1 Blac. Rep. 192.

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veyed to the judge making the order with such distinctness as for him in the exercise of his discretion to see that the plaintiff has been damnified to such an amount, and on which the deponent may be indicted for perjury if the facts be not truly stated, that is sufficient, though the affidavit might have been made in more formal terms. Besides, it does not appear to me to be so uncertain as is supposed; for the deponent swears to the value of the silver, and that it was to be delivered by the defendant to *E. B. for the use and on the account of Imlay*, by whom it had been before delivered to the defendant, and that the defendant has not delivered it, &c. Therefore the affidavit to hold to bail is framed with sufficient distinctness, and cannot be opposed by a counter affidavit.

Per Curiam,

Rule discharged.

Saturday,
June 26th.

BIRT and Others, Assignees of GLOVER, a Bankrupt,
against KERSHAW.

An indorser of a note, who has received money from the drawer to take it up, is a competent witness for the drawer in an action against him by the indorsee, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for

THE defendant, *Kershaw*, being indebted to one *Wilby* in 40*l.* 10*s.* drew a bill of exchange on one *Wilkinson* in favour of *Wilby* or order, which the latter indorsed to *Glover*, whose assignees brought this action on the bill against *Kershaw* the drawer; and at the trial before *Grose, J.* at the Sittings, *Wilby* was called as a witness by the defendant to prove that whilst the bill was current, *Glover* having told him (*Wilby*) that the bill would not be paid by the drawer, *Wilby* paid the bill himself by settling it in account with *Glover*, in whose hands it was however left, and *Kershaw* paid *Wilby* the amount again. The competency of the witness (who had no release from *Kershaw*) was objected to on the ground of his interest as an indorser on the bill, and therefore coming to discharge himself from his liability; and *Grose, J.* inclined to admit the objection; but to save expence it was agreed to receive the evidence, on which the Jury found a verdict for the defendant; and leave was given to the plaintiff to move to set that aside, and enter a verdict for himself for the amount of the bill, if the Court should be of opinion that *Wilby* was not a competent witness in this respect. A rule for that purpose having been obtained on a former day,

the costs incurred in the action by such non-payment makes no difference.

Erskine

Erskine and *Littledale* now shewed cause, and contended that *Wilby* was interested, if at all, the other way. For if the present verdict were established, he was liable to be sued by the plaintiffs as indorser on the bill, and could not give this verdict in evidence, but must then prove the payment of the bill by other testimony than his own: but if the plaintiffs recovered, *Wilby* was discharged from his liability on the bill, and *Kershaw* could not sue him, because he had only received from *Kershaw* the amount once, for which he was originally indebted to him, and which as between him and *Kershaw* he was entitled to retain. But it would be sufficient if the witness stood merely indifferent between the parties, according to *Evans v. Williams* (a). The case of *Buckland v. Tankard* (b) does not apply, because that turned on the greater difficulty which the witness was supposed to be under of getting the money from the one party whom he came to favour than the other: whereas here, if the defendant succeed, it will be more easy for the plaintiffs to sue *Wilby* on the bill, in which action nothing more will be necessary to be proved than his hand-writing; then if the plaintiffs succeed, it will be easy for the defendant to make out his case against *Wilby*. For this record would be no evidence for the present defendant in such an action against *Wilby*, being *res inter alios acta* (c). [Lord *Ellenborough*. I think that is stated too generally. This record, supposing the plaintiffs recovered, would be evidence for *Kershaw* in an action against *Wilby* to recover back the money paid to him for taking up this bill, so far as to shew the fact that the plaintiffs had recovered the amount of the bill against the defendant. And even further, *Kershaw* might allege as part of the damage arising from *Wilby*'s neglect, to pay over the money which he received for taking up the bill, that he had been sued by *Glover*'s assignees, who had recovered the amount of the bill against him with costs.]

Garrow and *W. Walton*, in support of the rule, insisted, that *Wilby*'s condition was bettered by the evidence he had given; for at the most, if the verdict stand, *Wilby* will only be liable to be sued as indorser of the note, and that under the disadvantageous circumstance of the plaintiffs having failed in their action against the drawer, on the ground of the bill having been

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(a) *Sittings at Guildhall after Tr. 23 Geo. 3. cor. Lord Kenyon, C. J. cited in Ilderton v. Atkinson*, 7 Term Rep. 481.

(b) 5 Term Rep. 578.

(c) 5 Term Rep. 589. *Green v. New River Company*.

satisfied.

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satisfied. Whereas, if the plaintiffs succeed, *Wilby* will not only be liable to refund the amount of the note, the value of which he has twice received, once when he passed it to *Glover*, and afterwards again from *Kershaw*; but he will also be liable to make good to *Kershaw* the costs of the present action, to which he would be subjected by *Wilby's* fraud or negligence: and this record would be evidence against *Wilby* of the fact of such recovery.

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LORD ELLENBOROUGH, C. J. It appears to me in a very simple and clear view of the case, that the witness stood indifferent between these parties. He must either be liable to the plaintiffs as indorsers of the bill, or to *Kershaw* for the money received by him in order to discharge it. It is true, that in the latter case, if these plaintiffs recover, he may also be liable to *Kershaw* for the costs of this action: but that argument was urged in *Ilderton v. Atkinson* (a), without effect. This record, though evidence of the fact of such recovery, would not relieve *Kershaw*, in such an action against *Wilby*, from the proof of his having paid money to the latter, for the purpose of satisfying the bill. I know of no other than the case of *Buckland v. Tankard* (b), which goes on the ground of more or less difficulty in the witness in establishing his interest against one or other of the parties. But all the other cases go on the broad ground of interest in the witness: and as he seems to have stood indifferent as to the sum in dispute between these parties, I think his testimony was properly received.

GROSE, J. It struck me at the trial, adverting to the opinion of Lord *Kenyon* in *Buckland v. Tankard*, that the witness had an interest in giving the testimony he did, and that his condition would be bettered by it. But if his being liable over to the plaintiffs take away his interest and leave him indifferent, I agree that he ought to be heard.

LAWRENCE, J. This case falls directly within the principle of that of *Ilderton v. Atkinson*. With respect to the amount of the bill in question, the witness stood indifferent between the parties; for if the plaintiffs recovered, *Kershaw* would be entitled to recover back the money which he had paid to *Wilby*, in order to satisfy this very bill, because he would then have paid the money twice. On the other hand, if *Kershaw* have a verdict, the plaintiffs may recover against *Wilby* on the bill, unless he can prove payment by legal evidence.

LE BLANC, J. Consider the situation of the witness without * his being an indorser on the bill. He admits that he has received from one man a sum of money for a debt which he owed to another in order to pay it over to that other. It is clear then that he must be liable either to the one or the other. And if the original debtor obtain a verdict by means of his evidence, he will be liable to be sued by the creditor, for whose use the money was received; and the verdict in this case will be no evidence of the payment for him in the other. Then how does it alter his situation that he is upon the bill? If the plaintiffs do not recover now, they may sue him on the bill; and if they do recover, then by his own account he is answerable over to *Kershaw*.

Rule discharged,

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The KING against The BISHOP of EXETER.

Monday,
June 28th.

A RULE was obtained in the last Term, calling on the defendant to shew cause why a mandamus should not issue, commanding him to grant a licence to *John Rowe*, clerk, to be lecturer within the parish of *Fremington*, in the county of *Devon*.

The affidavit of *Mr. Rowe* stated, that *John Dodderidge* deceased, by his will dated 20th of *January*, 1658, devised a rent-charge of 50*l.* per annum, payable out of his rectory of *Fremington*, for the use of a lecturer within the parish of *Fremington* for ever. That upon the death of the late lecturer in *January* 1795, *William Barbor*, in whom the rectory (a) was then vested, appointed the deponent by deed bearing date 16th *March*, 1797. That lectures have been read in the parish church of *Fremington*, and the annual stipend of 50*l.* regularly paid to the several lecturers, pursuant to the will of *J. Dodderidge*, from his death to that of the last lecturer. That after the deponent's appointment, application was made to the bishop for a licence, which he refused, alleging as a reason that the present vicar of *Fremington* had objected to the deponent's using his church, and that he (the bishop) had determined not to grant a licence without the vicar's consent, although he allowed that he had no objection to the deponent as a clergyman, and that the testimonies he had received from him were complete. That in *Hilary* Term,

Where no immemorial custom appeared to appoint a lecturer in a parish church, and on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and

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that the rectorship was originally endowed by the rector, with an annual stipend, payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishop and vicar for the time being.

(a) It was an impropriate rectory.

1798,

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1798, upon the bishop's first refusal to grant the licence, a similar motion was made in this court for a mandamus; which went off in *Trinity* Term following, upon a proposal made in Court to recommend to the vicar to give his consent. That in *July* 1800, *W. Barbor* died, and was succeeded by his brother *G. Barbor*, as heir at law and devisee. That in *January* last, the deponent applied again to the vicar for his consent, who refused to give it; in consequence of which the bishop also again declined to grant the licence.

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Garrow and *Dampier* shewed cause against the rule, upon the affidavit on which it was grounded; wherein it appeared that the vicar refused his consent, which they contended was alone a sufficient reason in this case for the bishop to refuse his licence. No immemorial custom is sworn to, which alone can ground any right of admission to the use of the church without the vicar's consent. That was relied on by Lord *Mansfield*, in *Rex v. The Bishop of London (a)*, and adopted by Lord *Kenyon* in *Rex v. Field (b)*. In the first of those cases indeed, the lecturer was paid by voluntary contributions; and in the other he was paid out of the parish rates; which was relied on as decisive that it could not be an immemorial endowment. Now here the period stated when this lectureship was endowed (anno 1658) is decisive, not only that it is not immemorial, but that it could not have a legal commencement for want of one of the proper legal parties to assent to the endowment: for this, together with other fees in the kingdom, was then vacant. [This fact being objected to by the counsel on the other side as not being in the affidavit, Lord *Ellenborough* observed that they might take notice that what was done then was at a period when the episcopal constitution was suspended.] It would be productive of great public inconvenience, if every person who chose to dedicate a small freehold in a parish to the use of a lecturer, could therefore appoint whom he pleased to preach in the parish church without the assent of the vicar, in whose discretion, in the first instance subject to the confirmation of the bishop, the law has reposed this confidence. By the same rule, any number of persons might do the same, to the entire overthrow of all order and discipline in the church. [Lord *Ellenborough* said that they need not labour that point, that no person could by compulsion, and at his option, engraft a lectureship on the church.]

(a) 4 *Term Rep.* 331.

(b) 4 *Term Rep.* 125.

Then it is sufficient that the vicar refuses his assent, and he is not bound to assign his reasons; which may be very sufficient without affecting the moral character of the candidate.

Gibbs and Wood in support of the rule. The fund was stated in the affidavit, in order to shew a legal endowment, without which there could be no claim. The bishop admits that there is no personal objection to the fitness of the candidate; and that is the only satisfaction which the duty of his function requires him to demand: he has no concern with the right to the lectureship, as was said in the churchwardens of *St. Bartholomew's* case (a). The stat. 13 & 14 *Car. 2. c. 4. s. 19.* makes it necessary for the lecturer to have the bishop's licence, without which he is disabled from trying his right to the lectureship with the vicar, or recovering the stipend from the heirs of the donor; but the licence itself confers no right, and only puts the matter in a course of trial. The refusal of the vicar then to consent, is not a sufficient ground for the bishop to refuse his licence. It has been said indeed, that a rector may refuse the use of the church; but it has never been decided that a vicar has the same power of refusal. And though this lectureship were founded in the time of the usurpation, yet it has been since accepted by all the proper parties; and both the bishops and vicars for the time being have accepted persons to be lecturers. Besides, if the licence were granted, it might be a question whether the lecturer would not be entitled to his stipend by lecturing at any place in the parish, though not in the parish church, according to the terms of the endowment.

LORD ELLENBOROUGH, C. J. What use might be made of the licence when granted is not material to be inquired into at present; the only question for us to consider now is, Whether there be any legal title in the party applying to the thing sought to be obtained? Now it appears that Mr. *Rowe* has no legal title to the lectureship which should call upon the Court to put the law in motion to enable him to obtain it. No legal custom is stated to appoint the lecturer to the use of the church without the consent of the vicar; and it is not competent to any person to engraft a lectureship by compulsion on the church; otherwise it might be done for the most capricious

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(a) 3 *Salk.* 87.

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purposes, and in abuse of the regular institutions of the church, and might overthrow the whole establishment. Such a lectureship must have a legal commencement by custom or Act of Parliament. This cannot exist by immemorial custom, which the law presumes to have had a legal commencement, because it is traced to its commencement in 1658. And it could not then have had a legal commencement; because even if the bishop, the rector, and vicar, could, by their joint assent, engraft it on the church, there were no such persons then all existing having competent authority to accept the endowment on the part of the church. Lord *Mansfield*, in the case of the Bishop of *London* says, that no person can use the pulpit of a rector without his consent: that must mean a consent by the person who has the possession of the church, which appears here to be in the vicar. There being therefore no legal right in the present applicant, without which there can be no claim on the Court to exercise its jurisdiction, I think we ought not to grant the application.

GROSE, J. It is sufficient to reject the application that the party has shewn no legal right to what he claims.

LAWRENCE, J. In *Rex v. The Bishop of London* (a), one ground on which the mandamus was refused was, that it would be nugatory to grant it: for (said the Court) it would be to no effect for them to grant a mandamus to the bishop to license a lecturer when he had not obtained the consent of the rector, who had, notwithstanding such licence, a right to refuse him the use of the pulpit. So here it would be nugatory to grant this application, when it appears that the vicar withholds his consent to the same purpose.

LE BLANC, J. The same doctrine prevailed in *The King v. Field*. There the mandamus did not issue, because there was no right in the party applying to do the thing for which the mandamus was prayed.

Rule discharged.

(a) 1 *Wils.* 11.

1802.

FROGMORTON on the Demise of FLEMING, Clerk, *against*
SCOTT, Clerk.

Monday,
June 28th.

THIS was an ejectment to recover the rectory of the parish-church of *Thornton*, in the county of *York*, together with the parsonage-house, glebe, and tithes, of which the lessor of the plaintiff was rector, and which had been demised by him to the defendant, by a lease dated the 1st of *December*, 1792, made to the defendant, therein described to be *Doctor in Divinity*, to hold from three years to three years (if the lessor should so long live and continue rector) during the term of twelve years, at the yearly rent of 50*l*. At the trial at the last assizes at *York*, it appeared that the lessor of the plaintiff was the rector of *Thornton*, and made the lease in question to the defendant, Dr. *Scott*, who officiated as his curate in the parish; and that the rector had been absent from the parish for several years. Therefore it was contended that the lease was absolutely void by the statute 13 *Eliz. c. 20*.

A verdict was taken for the plaintiff, with leave to the defendant to move to set it aside and enter a nonsuit instead. And a rule nisi having been obtained in the last Term for that purpose,

Wood now shewed cause, and contended that the lease was void: 1st, By the stat. 21 *Hen. 8. c. 13. s. 3.* which avoids all leases of any manors, lands, tenements, or hereditaments to a spiritual person, which the defendant appears to be by the designation of himself in the lease itself, being therein styled *Doctor in Divinity*. 2dly, By the stat. 13 *Eliz. c. 20.* whereby all leases of any part of a benefice are absolutely avoided immediately upon the incumbent absenting himself therefrom for the space of fourscore days in a year. Here the rector had discontinued his residence for a much longer period after the granting the lease in question. And it cannot be objected that there is a covenant in the lease that the rector shall not do any act to avoid it; for a covenant is no bar, whatever remedy may be had on it afterwards.

Erskine, in support of the rule, said, in answer to the objection on the stat. of *Hen. 8.* that there was no evidence that the defendant was a spiritual person, though called so in the lease

A rector may recover in ejectment, against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 *Eliz.* 20.

And the lease to the defendant describing him as *Doctor in Divinity* produced by him at the trial in sup-

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port of his title, is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 *H. 8. c. 13. s. 3.*

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lease granted by the lessor. And as to the stat. of *Eliz.* that after the cases of *Doe v. Mears (a)*, and *Doe v. Barber (b)*, it could not be contended that the lease in question might not be avoided on account of the non-residence of the rector; but still it was not competent to the rector himself to set it aside by shewing his own breach of duty.

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LORD ELLENBOROUGH, C. J. The stat. 13 *Eliz. c. 20.* expressly enacts, "That no lease to be made of any benefice, &c. "shall endure any longer than while the lessor shall be ordinarily "resident and serving the cure of such benefice, without absence "above fourscore days in any one year, but that every such lease "immediately upon such absence shall cease and be void." It is plain therefore that the Legislature meant that the lease should be wholly cut down and done away by the non-residence of the rector. It was so considered in the case of *Doe v. Barber*, even as against a stranger and wrong-doer (c): therefore there is no ground for the distinction attempted to be taken between that case and the present. And I think the other ground of objection equally clear on the stat. 21 *H. 8.* The defendant is described in the lease itself, produced by him, as a spiritual person.

Per Curiam,

Rule discharged.

(a) *Cowp.* 129.

(b) 2 *Term Rep.* 749.

(c) But such lessee may maintain trespass upon his mere possession against a wrong-doer. *Graham v. Peat*, ante, 1 vol. 244.

Monday,
June 28th.

BILBIE against LUMLEY and Others.

Money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances, cannot be recovered back

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again on account of such payment having been

THIS was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance, in order to recover back 100*l.* which he had paid upon the policy as for a loss by capture to the defendants the assured. The ground on which the action was endeavoured to be sustained was, that the money was paid under a mistake, the defendants not having at the time of insurance effected, disclosed to the underwriter (the present plaintiff), a material letter which had been before received by them, relating to the time of sailing of the ship insured, made under an ignorance of the law.

sured.

sured. It was not now denied that the letter was material to be disclosed; but the defence rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question; and therefore it was contended at the trial before *Rooke, J.* at *York*, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law: the plaintiff not being apprized at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back, was a defence to any action which might have been brought on the policy: and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last Term, for setting aside the verdict and having a new trial: which was to have been supported now by *Park* for the defendants, and opposed by *Wood* for the plaintiff. But after the report was read, and the fact clearly ascertained, that the material letter in question had been submitted to the examination of the underwriters before the adjustment,

Lord ELLENBOROUGH, C. J. asked the plaintiff's counsel, whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law. [No answer being given, his Lordship continued.] The case of *Chatfield v. Paxton (a)*, is the only one

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I ever

(a) That case came before this Court on a motion for a new trial in M. T. 59 *Geo. 3.* The circumstances were so special, and there was so much of doubt in it, that it was not thought to be of any use to report it. The outline of it was this: A mercantile house in India (of which the defendant was a surviving partner residing here at the time) received a bill drawn by the plaintiff on another house in payment of a debt, which bill the defendant's house made their own by laches; but not apprizing the plaintiff of this, they sent him back the bill protested for non-payment, and drew upon him for the same amount in favour of a mercantile house in London (some of whom, amongst others the defendant, were also partners in the house in India.) The plaintiff, ignorant of the laches of the house in India, accepted the new bill; but, before payment, he received some information of the laches;

1802. I ever heard of where Lord *Kenyon* at *nisi prius* intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse

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laches; yet not such particular proof of it as would have enabled him to defend himself against the demand upon his acceptance in a Court (even if the house in India were to be considered the same as that in London). Therefore the plaintiff paid his acceptance, and afterwards brought this action to recover the money back from the defendant as a partner in the house in India, and obtained a verdict under the direction of Lord *Kenyon*. Upon the motion for the new trial, his Lordship and *Ashhurst, J.* were clearly of opinion that the action was maintainable; considering as it seemed that the defendant's house in India had obtained the plaintiff's acceptance in the first instance by a fraudulent concealment of their laches, and that the plaintiff had not voluntarily and with a fair knowledge of his case submitted to pay it; but had paid it from the necessity of the thing, and under a protest, that if on his arrival in India he afterwards found his suspicions confirmed, he should call upon the house there to indemnify him. *Ashhurst, J.* added, that where a payment had been made not with full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again. That here the plaintiff was under great uncertainty of the facts at the time he accepted the bill, and even if he knew them all before actual payment, yet that his knowledge would have come too late, and it would have been no answer to an action by the payees who were not parties to the transaction; but that his proper remedy was against those persons by whose misconduct he was placed in that situation. *Grave, J.* said he had great difficulty in adopting the opinion of the two other Judges to the full extent of it; principally because he was not satisfied that the plaintiff had not a sufficient knowledge of the ground of his defence before payment of the bill, whatever he might have had when he accepted it: but as the verdict was with the honesty of the case, he inclined against disturbing it; and the rather, because he doubted whether the house in India and that in London were to be considered as the same, so that the plaintiff could have resisted the payment of the bill to the latter, because one of their partners (the defendant) was also a partner in the other house, though he had no knowledge in fact of the laches. *Lawrence, J.* also doubted on the former ground, as the plaintiff seemed to have been apprized before payment of the bill of the general outline of his defence; but as he was not then so conversant of the particular facts now appearing as to have been able to resist the demand then made on him if an action had been brought, but seemed to have had only a confused notion of them, expecting to be better informed when he arrived in India, he doubted how far the *maxim volenti non fit injuria* could be applied to him.

of ignorance might not be carried. It would be urged in almost every case. In *Lowrie v. Bourdieu (a)*, money paid under a mere mistake of the law, was endeavoured to be recovered back; and there *Buller, J.* observed that *ignorantia juris non excusat, &c.*

Per Curiam,

Rule absolute.

(a) *Dougl.* 467.

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THIS was an action upon the case, against the underwriter on a policy of insurance, dated the 14th of *February*, 1799, on a bottomry bond on the *Danish Shaw, Frow Anna*, upon a voyage at and from *Penzance* to *Genoa*, for 200*l.* at a premium of 20 guineas *per cent.* Plea the general issue. At the trial before *Le Blanc, J.* at the Sittings at *Guildhall*, after last *Hilary* Term, a verdict was found for 200*l.* subject to the opinion of the Court, upon the following case:

“That the ship *Frow Anna* was in fact a *Danish* ship, but “was, in the course of her voyage from *Penzance* to *Genoa* “captured by a *French* privateer, and taken into the port of “*Malaga* in *Spain*. That the captor instituted proceedings “against the ship before the Consul of the *French Republic* residing at *Malaga*, who thereupon on the first of *April* 1799, at “*Malaga* aforesaid, pronounced the following sentence:—“We “*Nicholas Maurit. Champre*, consul of the *French* republic in “the kingdom of *Grenada* in *Spain*, residing in *Malaga*, authorized by the laws of 3d *Brumaire* (25th *October*) and 8th “*Floreal* (28th *April*), of the 4th year of the *French* republic, “to give sentence, whether the prizes brought into any port “belonging to this consulship, by any vessel or privateer of the “*French* republic be lawful or not?”—The sentence then recapitulates the case, and proceeds as follows: “That so many “motives united, leave no doubt of the confiscation of the said “vessel being lawful, as well as on account of her being *English* “property as on account of the offences against the ordinances. “That the cargo is of *English* growth and manufacture, and “being besides proved *English* property by the piece of 13th “page already referred to, is also condemned, being on board a

Sentence of condemnation of a prize, taken by a *French* privateer and carried into *Spain* by a *French* court sitting there (Spain being then a belligerent ally of France in the war against Great Britain) is valid; and such condemnation proceeding on the ground of the property being enemy's and British, is conclusive in an action on a policy against the underwriter by the assured who had insured it as *Danish*, which in fact it was, Denmark being then neutral.

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“vessel which is *English* property. We therefore declare the
 “vessel called *Frow Anna*, Captain *A. B.* taken by the *French*
 “privateer *Le Zenodore*, Captain *H. P.* a good prize, with her
 “masts, &c. to the profit of the proprietors of the *Zenodore* and
 “her crew, and others interested in her, together with the goods,
 “without any exception, that compose her cargo; and order
 “all guardians and trustees to make the delivery of the same up
 “to them; by which delivery we declare the said guardians and
 “trustees duly and lawfully discharged of their trust. And we
 “permit to the said proprietors of and persons interested in the
 “*Zenodore*, or to those who have the power to procure the sales
 “of the ship and cargo in the chancery of the consulship of the
 “French republic in this port, charging them however to
 “deposit the value in the said chancery, or in any other public
 “treasury in which they may be authorized so to do, till the
 “allowed time of appeal be expired, or in case of appeal until
 “the definitive sentence, which, if it should be against them,
 “they are to pay all the rights and expences which might be
 “done in consequence of the said sale, the lot of livre to the
 “invalids, and other duties; also the law expences, and the
 “expences of the present sentence of condemnation, which will
 “be executed notwithstanding the rights of appeal; and inti-
 “mated to all whom it may concern.—Done in the Consulatory
 “House, and sealed with the national seal of this consulship of
 “*Malaga*, the 11th of *Germinal*, in the 5th year of the *French*
 “republic (1st April 1797) one and indivisible.” (Signed)
 “*Champre*, consul.” That at the time of the capture and of

[475] the pronouncing the aforesaid sentence, the *French* and *Spaniards*
 were allies, at war with this country, and *Denmark* was neutral.
 The question for the opinion of the Court was, Whether the
 said sentence (a) were conclusive evidence that the warranty in
 the policy was not complied with? If it were not, the verdict to
 stand: if it were, a nonsuit to be entered.

Giles, for the plaintiff, contended for the negative. The
 principal question in effect is, Whether, by the law of nations, a
 Prize Court can be established and exercise its functions in any
 other state than that to which it belongs, and from which it
 derives its authority? That the Prize Court of a belligerent can-
 not exercise jurisdiction in a neutral country, was clearly

(a) Either party were to have liberty to refer, if necessary, to the sentence
 at large.

decided in the case of the *Flad Oyen* (a). Neither can it do so in the state of a co-belligerent, for the same reason, because it is not warranted by the law and usage of nations. It is essentially necessary to have a known tribunal, for determining whether a capture at sea be piratical or lawful; and though a neutral nation would, on general reasoning, appear to exercise this jurisdiction the most impartially, yet constant usage, which is the foundation of the law of nations, has long settled that the inquiry is to be made in the state of the captors, who are individually and nationally responsible for the act. This is expressly asserted in the Duke of Newcastle's letter to Mons. *Michell* (drawn up by Sir *Dudley Ryder*, and other eminent and well informed persons, 1 *Mag.* 482) in answer to the *Prussian* memorial; and in the case of the *Flad Oyen* (b), Sir *W. Scott* considers that sentence of condemnation is necessary to the validity of the captor's title; which sentence, he says, must be pronounced by a tribunal in the belligerent country. Now here the condemnation was by a Court in *Spain*, acting under the authority of *France*. But if the circumstance of their being co-belligerents against *England* cannot identify their respective territories, even considering the prize as a question of property between *English* and *French* subjects, still less can it do so as against a *Dane*, whose property the prize in fact was; because, as to *Denmark*, *Spain* was a neutral country, within which it is settled that no such condemnation can take place. *Havelock v. Rockwood* (c).

The plaintiff's counsel was then proceeding to contend, that the sentence of condemnation, admitting it to have been pronounced by a competent tribunal, was not conclusive as to the question of neutrality, which was collateral to the question of prize or no prize: but *The Court* said, that after the repeated determinations to the contrary, it would be nugatory to open that discussion again, especially upon a case reserved, on which there could be no appeal to the dernier resort.

Carr, contra, contended that co-belligerents had a union of territory against their mutual enemy, as for all purposes of war, of which the capture of prize was one. The question turns purely on the law of nations, of which Prize Courts have peculiar jurisdiction; and therefore this Court is bound

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(a) 1 *Rob.* 135.

(b) *Ib.* 132, 140.

(c) 3 *Term Rep.* 262.

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to give credit to the decision of the Prize Court acting as such at *Malaga*, with the * consent (as it assumes, and which is not disputed) of the sovereign power of the country. There is nothing inconsistent in this between two belligerent countries, as there is in such a compact between a belligerent and a neutral country; upon the ground of which inconsistency alone the judgment in the *Flad Oyen* case proceeded; because, as was properly there said, such a Court sitting in a neutral country was an infringement of its neutrality, with respect to the other belligerent whose property was captured and condemned there. But there is a union of interest, of defence and attack, between co-belligerents against their enemies; and as *Spain* could have ceded *Malaga* entirely to *France* at that time, without infringing any duty she owed to *Great Britain*, there was no reason why she should not have made a partial cession of her sovereignty for a particular purpose of war. *Vattel*, 2 book, c. 7. s. 89. confirms the power of one nation to grant privileges of sovereignty to other nations within its own dominions. It makes no difference in this case whether the question be considered as between *France* and *Spain* and this country, or as between the two former and *Denmark*; their relative duties were the same; they were both inimical as to us, and both neutral as to *Denmark*. If this were the property of a neutral, it was equally tried by the law of nations; and he was equally secure of impartiality, whether the question were tried in *France* or *Spain*. He referred to Lord *Mansfield's* opinion in *Lindo v. Lord Rodney* (a). The sentence, however, has determined this to be *English* property, which is conclusive. The novelty of the case cannot prevent the application of the law of nations to it, which, though in ordinary cases it may be illustrated by usage and example, must, as it has often before happened, be drawn from first principles, as new circumstances and combinations arise in the world. That the law and practice of nations has in some respects varied very considerably, is acknowledged by Sir *W. Scott* in the case of the *Santa Cruz* (b). But in the *Flad Oyen* case, all the reasoning of the same learned Judge, in shewing that the condemnation in a neutral country was invalid, is founded on the distinction between a neutral and a belligerent country, and goes to prove, that a condemnation in the country of a co-

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(a) *Dougl.* 614. n.(b) 1 *Rob.* 59.

belligerent

belligerent would be valid. Nowhere is a *capturing* contradistinguished from a *belligerent* power. In the case of the *Christopher* (a), the condemnation *in France* of a *British* ship taken by a *French* privateer into a *Spanish* port, and then lying *there*, was holden valid. That cannot be distinguished in principle from the present case, and the grounds of the judgment necessarily include it. It was contradistinguished only from the case of the *Flad Oyen*; because that was a condemnation in a *neutral* country, which had no common interest with the captors on the subject. And a case of the *Betsy Kruger*, 12th August, 1800 (b), is there referred to, where the legality of a condemnation like the present was expressly admitted by the Court, and was thought too clear to be contested by the advocates. The same principle has been since recognized in the case of *The Kierlighett* (c), and that of the *Cosmopolite* (d); and must have been acted upon long ago under the stat. 4 and 5 W. & M. c. 25.

LAWRENCE, J. (e) The question is, Whether this sentence of condemnation be conclusive evidence that the property insured was *British*, and consequently that the warranty of its being neutral was not complied with? The argument was attempted to be carried into a wider field than we think it fit now to enter into, since the case of *Hughes v. Cornelius* (f), and a long string of authorities which have followed that decision. We must now therefore take it for granted, that if this sentence were given by a Court of competent jurisdiction, it is conclusive upon the point then in judgment, namely, against the neutrality of the property. The case of the *Flad Oyen* has been made the basis of the argument, to shew, that unless the Prize Court were constituted according to the law and practice of nations, it could have no jurisdiction. If there were no other case on the subject determined by the same learned Judge, to explain how far he meant to go in that case, it might be doubtful, from some expressions there used, whether it did not extend to a case circumstanced like the present: but if we look at his other decisions on this subject, particularly in that of the *Christopher*, though I do not mean to say that it is directly in point, it suf-

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(a) 2 Rob. 209.

(b) *Ib.* 210. n.

(c) 3 Rob. 96—9.

(d) *Ib.* 333.

(e) Lord Ellenborough having been concerned in the cause, gave no opinion; and Grose, J. was absent, from indisposition.

(f) *T. Rau*, 473. *Skin*, 59, and 2 *Show*, 232.

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ficiently appears from the reasons assigned by him in giving judgment, to what extent he meant the doctrine laid down by him in the *Flad Oyen* case should be understood; and that he did not intend to deny the legality of such sentences of condemnation by the captors in the country of a co-belligerent or ally in the war; because, as he observes, there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. This very question appears to have arisen in several subsequent cases; and in the case of the *Betsy Kruger*, in August 1800, seems to have been considered by the advocates as so thoroughly understood and settled, that the question of law was waved, as one not to be discussed; and the Court, proceeding on the ground that the condemnation was legal, directed further proof to be made of the fact of the transfer. We find then this question already determined by a Court having peculiar jurisdiction in cases of this sort, of which we have only incidental jurisdiction. That determination therefore is as conclusive on us, as to the proper rule of decision, as a judgment of the Common Law Courts on a question of real property would be in the Civil Law Courts.

LE BLANC, J. The subsequent cases referred to are explanatory of the opinion delivered by Sir W. Scott in the case of the *Flad Oyen*, and shew that he considered that there was a material distinction between a sentence of condemnation, pronounced by the authority of the capturing country in the state of a co-belligerent, and one so pronounced in a neutral country. Now this is the case of a sentence of condemnation in the country of a belligerent power, an ally of the captors; and is exactly like the cases of the *Harmony* (a), the *Adelaide*, and the *Betsy Kruger*. The first was a condemnation by the French commissary of marine at Rotterdam, of a British prize taken and carried into *Helvoetsluys*, which was in the country of a belligerent ally; which was so far considered as different from the case of such a Court sitting in a neutral country, that the neutral claimant was directed to go into proof of the merits as to the transfer, reserving the question of law. And in the last-mentioned case of the *Betsy Kruger*, the point was consi-

(a) 2 Rob. 210. n.

dered to be so settled, that the advocates waved the discussion of it, and the Court considered the condemnation as legal. *That I consider as a case directly in point, to support the legality of a condemnation in the country of a belligerent ally. This Court therefore must decide the question consistently with the opinion of a Court of peculiar jurisdiction on the same point, until we are told by a superior tribunal that that determination was improper.

Judgment of Nonsuit,

DOE, on the several Demises of the DUKE of NORFOLK and JOHN IBBOTSON, *against* HAWKE and Another.

ON the trial of an ejectment for a certain messuage and lands in *Yorkshire*, at the last *York* assizes, a verdict was found for the plaintiff on the demise of *John Ibbotson*, and for the defendants on the demise of the Duke of *Norfolk*, subject to the opinion of the Court on the following case :

Joseph Whiteley was lessee of the premises in question for the term of twenty-one years, commencing from the 29th September 1789, under a lease granted to him by the Duke of *Norfolk*, dated 25th January 1790. *Whiteley* entered into possession of the premises under this lease; and made his will, dated 10th October 1790, whereby he disposed of the premises in question as follows: "I give and bequeath to my nephew, *Abraham Ibbotson*, with submission to the Duke of *Norfolk*, "the tenant-right of my farm at the *Edgefield*, which I hold "by lease, under his Grace, he paying the rent, and conforming to the covenants in the lease; *but not to dispose of or sell "the tenant-right to any other person: but if he *refuses to dwell "there himself, or keep it in his own possession, then my will is, "that my nephew John Ibbotson (one of the lessors of the plaintiff) shall have the tenant-right of the farm at the Edgefield."*

And the testator directed (amongst other things) that the said farm should be delivered up, as before willed, a year and a day after his decease, by his executrix: and he appointed his niece,

with whom the deeds were deposited, he paying the debt of the plaintiff in the execution; and *A. I.* having left the premises, and ceased to dwell there on the day of the execution, before the sheriff entered, held that *A. I.* the remainder-man was entitled to enter, the estate of *A. I.* having determined by such his acts.

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A. gave by will his tenant-right, which he held by lease, to *A. I.* but not to dispose of or sell it; and if he refused to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money, left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor

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Sarah Ibbotson, sole executrix; and gave the residue of his effects to her. The testator *Whiteley* died in *January 1799*, having continued in possession of the premises till his death. The executrix married *Rowland Hartley*, and duly proved the will and administration was granted to her, and she and her husband entered into the possession of the premises on *Whiteley's* death. And in *February 1800*, possession of the premises was duly delivered by them, together with the lease, to *A. Ibbotson*, in pursuance of *Whiteley's* will; and *A. Ibbotson* continued in such possession till he quitted the same as after-mentioned. When *A. Ibbotson* was in possession of the premises, *J. Crookes* lent him 25*l.* on his note of hand; and thereupon *A. Ibbotson* deposited with *Crookes* the lease of the premises as a further security. At the time of lending the 25*l.* it was agreed between *Crookes* and *A. Ibbotson*, that *Crookes* should have the first chance for the farm; but no actual valuation was made. *Crookes* made further advances to *A. Ibbotson*, amounting in all to 60*l.*; but *Crookes* knew nothing of *Whiteley's* will until the whole of the 60*l.* had been advanced. Afterwards, *A. Ibbotson* was arrested at the suit of *R. Hartley*, to whom he (*A. Ibbotson*) had given a warrant of attorney; and thereon *Crookes* paid for *A. Ibbotson*, at his request, 60*l.* more, to effect *A. Ibbotson's* liberation. After this, *Crookes* took from *A. Ibbotson* a warrant of attorney to confess a judgment, and a bill of sale of *A. Ibbotson's* goods; but never entered up judgment on such warrant of attorney. Then one *William Greaves*, at *A. Ibbotson's* request, paid off the money advanced by *Crookes*, and took from *A. Ibbotson* a fresh warrant of attorney to confess a judgment; and at the same time the lease, and a copy of *Whiteley's* will (which had been in *Crookes's* possession) were delivered by *Crookes*. Judgment was entered upon the warrant of attorney so given to *Greaves*, and execution thereon issued in *Trinity Term 1801*: but before the entry with *Greaves's* execution, one *Joseph Schofield*, another creditor of *A. Ibbotson*, had levied an execution upon part of the goods of *A. Ibbotson*, which execution being satisfied by *Greaves*, was withdrawn, and possession was taken under his execution; and the lease of the premises in question was, on the 18th *June 1801*, publicly sold and assigned by the sheriff under *Greaves's* execution to the defendants, who were immediately put into possession of the premises, and now continue solely possessed thereof.

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of. *A. Ibbotson* quitted the premises in the morning before the sale, and has ever since *ceased to dwell there, or have any possession thereof*. *John Ibbotson* (the lessor of the plaintiff) attended at the time and place of sale (which was public) and before the actual sale, gave notice of his claim under *Whiteley's* will to the defendants. The question was, Whether the plaintiff were entitled to recover on the demise of *John Ibbotson*? If he were, the verdict to stand; if not, a nonsuit to be entered.

Wood for the lessor of the plaintiff. The condition on which the farm was devised to *A. Ibbotson* was broken, and therefore *J. Ibbotson* was entitled to enter, to whom it was given over, in the event of *A. Ibbotson's refusing to dwell there himself, or keep it in his own possession*. Here it is stated as a fact, that *A. Ibbotson* quitted the premises on the day of the sale previous thereto, and has ever since *ceased to dwell there, or have any possession thereof*; and it appears from the rest of the case, that he has parted with the power of dwelling there. The object therefore of the testator is entirely defeated, which was, to compel *A. I.* to keep the farm in his own hands, or otherwise that it should go over to *J. I.* If it be objected, that the words of the condition only imply a *voluntary refusal* to dwell there, and not an absence by *compulsion of law*, as this will be contended to be, that is answered by the case of *Dommett v. Bedford (a)*, where the condition was, that the annuity bequeathed should not be alienated by the devisee, otherwise it was immediately to cease and determine; yet upon his bankruptcy, and the assignment of the annuity by the commissioners, it was holden to be determined, though that was no more a voluntary act of the bankrupt's than this. It is true, that in *Doe v. Carter (b)*, it was at first considered, that a taking of a lease in execution was not "a letting, setting, assigning, transferring, making over of it," &c. within the true meaning of those words, being done *in invitum*, and not a voluntary act; but when that question afterwards came on again in *Doe v. Carter (c)*, and it appeared that the warrant of attorney for confessing judgment, under which the lease was taken in execution, had been given for that express purpose, the Court held that it was a forfeiture of the lease, though ultimately taken by compulsion of law. The same principle applies here: the facts of the case shew, that *A. I.* borrowed the

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(a) 6 Term Rep. 684.

(b) 8 Term Rep. 57.

(c) Ib. 500.
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money on this specific security; for the lease was lodged with *Crookes*; that was a voluntary disposing of the lease: it was giving the creditor a specific lien on it, so that a Court of Equity would have compelled an assignment. But further, the parties had in view that the lease might be sold in satisfaction of the debt; for *Crookes* was to have the *first chance* for the farm. Afterwards, when the second warrant of attorney was given to *Greaves*, the lease was delivered over to him. Even in the first view of the case of *Doe v. Carter*, Lord *Kenyon* said, that if the warrant of attorney had been a *specific lien* on the lease, it would have been a forfeiture.

Lambe, contra. The mere circumstance of *A. I.* quitting the premises on the morning of the sale, a few hours before, cannot vary the question; it was all one transaction, referable to the taking possession of the premises by the sheriff under the execution. But in order to create a forfeiture, the *refusal to dwell*, &c. must be *voluntary*, and not a *ceasing to dwell by compulsion of law*. All conditions are not to be construed strictly; and in the first case of *Doe v. Carter*, (*a*) *Lawrence*, J. assigned the reason on which it was distinguished from *Dommett v. Bedford* (*b*); because that the intention of the devisor was, that the annuity should only be paid as long as the devisee could receive it; and as he could have no property in it after his bankruptcy, it would be contrary to the will of the testator to continue it. But the distinction was then taken between that and the case of a taking in execution, which was *in invitum*. There was no fraud intended here by depositing the lease, or granting the warrants of attorney, in order to elude the condition of the will, by having the lease afterwards taken in execution. *Crookes* was even ignorant of the condition at the time when the money was advanced; and the execution was afterwards executed *in invitum* as much as in other cases. Whether the depositing of the lease with the creditor would have given a specific lien on it in equity is not material to be examined; because the Court will only consider whether the facts stated amount to an absolute *forfeiture at law*.

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Wood, in reply, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The terms of this devise are to be considered as a conditional limitation, in which the in-

terest of *Abraham Ibbotson* in the premises is limited on certain events, on the happening of which it is given over to *John*; and the question is, Whether the acts of the party, whose incapacity is to be incurred on his refusal to dwell on the farm, or keep it in his own possession, have not determined his interest? When he deposited the lease with *Crookes*, as a further security for the several loans of money advanced by him, was this not a voluntary act?—and when the lease was afterwards delivered over to another creditor, who took up the first demand, and to whom a warrant of attorney was at the same time given, and considering that by so giving up the lease, he thereby disabled himself from mortgaging the premises; and by giving the warrant of attorney, he enabled the creditor to dispossess him at his option, must he not be taken to have contemplated at the time the legal consequence of these acts which afterwards ensued? That these were voluntary acts there can be no doubt. He put the creditor in possession of the document of the farm; and by all the authorities he thereby gave a specific lien on the lease: for, according to *Russel v. Russel*, 1 Bro. Chan. Cas. 269. and several other cases there mentioned, the making of such a deposit gives jurisdiction to a Court of Equity to compel a sale of the lease in discharge of the lien. As it then enables the other to turn the party out of possession in default of payment, it shews a purpose in the latter to part with the possession; and therefore the subsequent proceeding and execution is not strictly *in invitum*, so as to bring the case within that of *Doe v. Carter*: and there need not be fraud in the transaction; it is enough if there be a manifest intention to depart with the estate, followed by acts to that end, which, if not produced immediately by the procurement of the party, may yet be said to be done with his assent. Upon the whole, therefore, it is enough to say that here was a voluntary departing with the estate.

LAWRENCE, J. (a). The lease was given by the testator to *Abraham Ibbotson*, so long as he lived on the farm. The material words of the bequest are, “That he should not dispose of or sell the tenant-right to any other person; but if he *refused* to dwell there himself, or keep it in his own possession,” then it was to go over to the lessor of the plaintiff.

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(a) *Grose, J.* was absent from indisposition.

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Now, the word *refused* is only a figurative expression; meaning, if the first taker *ceased* to dwell there. There was certainly no occasion for any person previously to enquire of him, whether he would reside there or not; and that he should expressly *refuse* it.

LE BLANC, J. This would be a strong case if it rested even on the first point; for here are strong circumstances to shew that this was a departing with the possession of the estate by the party's own act. Besides which, on the construction of the will, it clearly appears to have been the intention of the testator, that if *A. Ibbotson* ceased to live on the premises, or keep them in his own possession, they should go over to *John Ibbotson*.

Postea to the plaintiff,

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Tuesd. y, against EVANS.
June 29th.

One devised his personal estate to *A.* and his real estate to *B.* and after *A.*'s death, and the deviser having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testament-

IN ejectment, tried before *Thomson, B.* at the last *Hereford* assizes, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Richard Philips being seised in fee of the premises in question, and also possessed of a considerable personal estate, by will, dated 20th *February*, 1801, duly executed and attested, devised the same as follows: "This is the last will and testament of me, *R. P.*" &c. "I give and devise all and singular my real estate, wheresoever situated, in the county of *Carmarthen*, and the borough of *Carmarthen*, to my mother *Jane Philips*, and her assigns, for life, without impeachment of waste: and from and after her decease, I give and devise unto my sister *Ann Jones*, an annuity of 20*l.* to be yearly issuing out of my said real estate during her life, clear of all deduc-

ary estate to *C.* and then added, "As to the rest of my real and personal estate, I intend to dispose of it by a codicil thereafter to be made to this my will." This is no revocation of the first will, whether considering that he meant to include the same property therein devised; because it is a mere declaration of an intent to dispose of it in future; and *non constat* that such disposition would be inconsistent with the first will: nor is it any revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had elapsed by the death of *A.*

tions

tions (with a power of distraining for it in case of default). I give and devise all my said real estate in possession or reversion to *T. L.* and *G. P.* and their heirs, in trust, to the use of my nephew *John Jones*, only son of my said sister, and his assigns, for and during his life, remainder to my said trustees and their heirs, to preserve contingent remainders; remainder to the first and every other son and sons of the body of my said nephew *John Jones*, and the heirs of their bodies, &c. (successive); and in default of such issue, to the use of all and every of the daughter and daughters of the body of the said *John Jones*, and the heirs of their bodies, &c. as tenants in common; and in default of such issue, I give and devise all my said estate to my cousin *T. Philips*, second son of my uncle *W. Philips*, of *Slebetch*, &c. clerk, his heirs and assigns for ever. As to all and singular my personal estate, I give and bequeath the same to my mother *Jane Philips*, whom I do appoint sole executrix of this my will; and I do hereby revoke all former and other will and wills."

Jane Philips, the mother and devisee for life, and also executrix and residuary legatee named in the will, died in *February* 1784, in the lifetime of the testator. After the making of the will, one *George Philips* devised to the testator a certain estate, called *The Coedgain Estate*, for life, with several remainders over, with the ultimate reversion to his the said *George Philips*' own right heirs; and died on the 20th *April*, 1784, after whose death the said reversion in fee expectant as aforesaid, descended and came to the said *Richard Philips*, as cousin and heir at law of the said *George Philips*. The said *Richard Philips* being so seised of the premises which he had when he made the will of 1781; and also of the said life estate in the *Coedgain* estate, of which he was likewise entitled to the reversion in fee as aforesaid, made another will in writing, dated 7th of *March* 1785, duly executed and attested, in the words following: "This is the last will and testament of me *R. P.* &c. Whereas my relation, *George Philips*, of *Coedgain* aforesaid, deceased, did by his last will and testament, duly executed, give and devise all his real estates in the several counties of *Carmarthen* and *Cardigan*, and county of the borough of *Carmarthen* (subject to the annuities therein granted) to me the said *Richard Philips* for life, remainder to *Richard Mansel*, second son of *Sir William Mansel*, of *Iscoed*, in the county of

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Carmarthen, Baronet, in tail, with other remainders over, and the reversion thereof to his own right heirs for ever: and whereas I, the said *Richard Philips*, am thereby entitled to the reversionary estate and interest expectant on the estates tail of and in the said real estates, as heir at law to the said *George Philips*. Now I do, by this my will, give and devise all my reversionary estate and interest of, in, and to the said premises so devised to me in manner aforesaid, by the said *George Philips*, deceased, to Dame *Mary Mansel*, the wife of the said Sir *William Mansel*, her heirs and assigns for ever. *As to the rest of my real and personal estate, I intend to dispose the same by a codicil to this my will hereafter to be made.* In witness whereof," &c.

Richard Philips died 7th October, 1792, unmarried, leaving *Anne Jones*, widow, one of the lessors of the plaintiff, his sister and heir at law, and next of kin; *John Jones*, her son and devisee, named in the will of 1781; and *Thomas Philips*, the ultimate remainder-man in such will, named him surviving. *The wills of 20th February, 1781, and of 7th March, 1785, were both found uncanceled, and have both been duly proved.* *John Jones*, the devisee for life, under the will of 1781, on the decease of the said *Richard Philips* in 1792, entered into possession of the premises in question; and so continued till his death, on the 23d June 1796. The testator, subsequently to the making the will of 1781, and before he made that of 1785, bought an estate, the consideration paid for which was 150*l.*: and subsequently to the will of 1785, he purchased an estate of the yearly value of 150*l.*; which last estate descended to the said *Anne Jones*, as his heir at law. The question for the opinion of the Court was, Whether the will of 1781 were revoked by the will of 1785?

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Phelps, for the lessor of the plaintiff, contended in the affirmative. It is a question of intent, reference being had to the circumstances of the devisor at the several times. In making the second will he must either have intended to confirm or revoke the first; but he could not have meant a confirmation of it, because taking them both to bear date in 1785, there is a repugnance and inconsistency in them in several particulars; for his mother, to whom he had devised a *life* estate by the will of 1781, was dead at the time of making the will of 1785; and to her who was then dead, he must be supposed to have bequeathed

all

all his personal estate absolutely, and also to have intended to constitute her sole executrix: an intention too absurd to impute to him. But as a revocation of the first, the second will is a perfect and consistent instrument, for therein, after disposing of his recently acquired estate, he declares his intention to dispose of the *rest of his real and personal estate* by a future *codicil to that his will*. That he did not make such future disposition is immaterial; it is enough that he thereby shewed a present intention that the first will should be revoked. He must have known that, by the intervening death of his mother, the whole of his *personal* estate was undisposed of; and he declares his intention, as well in regard to that as to the rest of his real estate in the same clause; and the future codicil of which he speaks, is to be annexed to *that his will*; disregarding altogether the first will, and calling the will of 1785 his *last* will.

Williams, Serjt. contrà. Revocations of wills are not to be favoured; and no intention to revoke can be presumed from making a subsequent will not inconsistent with the former, especially with respect to such parts as may well stand together. The occasion of making the second will is plainly expressed in it; namely, to dispose of the deviser's after-acquired property, which he mentions by name: and according to *Coward v. Marshall (a)*, two wills, disposing even of the same land, may be construed together, unless they are inconsistent. That case was recognized by Lord Hardwicke in *Willet v. Sandford (b)*, and the Attorney General v. *Heywood*, in *July 1741*. Then the mere circumstance of declaring that he meant to dispose of the rest of his real and personal estate by a future codicil, does not shew a present intention in the deviser, that the disposition he had before made should be immediately annulled. Admitting that he intended, at some future time, to make a codicil, disposing of the property in question differently from what he had done in his first will, and thereby to annul it, it does not follow that he meant to do so by any other instrument than such codicil; and as he lived several years afterwards without making it, it shews that he was satisfied to abide by what he had already done. At most, it only amounts to an intention to revoke; but never carried into effect. The statute of frauds points out the several ways in which *express* revoca-

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(a) *Cro. Eliz.* 721.(b) 1 *Ves.* 187.

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tions of wills can alone be made. But what would not have been revocation by parol before the statute, will not be so since, though reduced into writing, with all the formalities enjoined by the statute. Now a bare *intention* to revoke, though expressed by parol, was no revocation before the statute, unless the testator declared that he *did revoke* his will. It was so resolved in *Cranvel v. Saunders* (a): and this is no more than expressing an intention to revoke it by some future instrument: but until the codicil were made, how can the Court say whether it would be a revocation or confirmation of the will? The making a codicil does not in itself shew a disposition to revoke a prior will. Supposing the testator had even made a codicil, the contents of which could not be known, but it was only found to have contained a different disposition of the property, yet the Court could not adjudge it to be a revocation of the will without seeing the contents. *Hitchins v. Basset* (b) and *Harwood v. Goodright* (c). In the latter case in C. B. three Judges went the other way; but their opinion was over-ruled on a writ of error in this Court; which judgment was afterwards affirmed in Parliament: but admitting that some effect must be given to the words, stating, that as to the rest of his real and personal estate the deviser meant to make a future disposition of them, they need not relate to the real property devised by the first will; for besides the property which had come to him by the death of his relation, and which he distinctly disposed of by the second will, he had other real property undisposed of by the first will, which he had subsequently acquired by purchase; which sufficiently explains the use of those words. Then, as to the expression of his *last* will, it was said by the Court, in the late case between Lord *Walpole* and Lord *Cholmondeley* (d), that no reliance could be placed on it; for that was a man's last will which was confirmed by law to be such at the time of his death.

Phelps, in reply, said, That the residuary clause was not

(a) *Cro. Jac.* 497, and vi. *Moor*, 874.

(b) 2 *Salk.* 592. 1 *Show.* 537. 3 *Mod.* 203. *Show. P. C.* 146.

(c) *Cowp.* 87. and vide note (1) to Mr. *Cox's* edit. of *P. Wms.* 1 vol. 345. Vide *S. C.* in *C. B.* 3 *Wils.* 497. and 2 *Blac.* 937. and in *Dom. Proc.* 7 *Bro. P. C.* 344. where the judgment of *B. R.* reversing that of *C. B.* was affirmed.

(d) 7 *Term Rep.* 144—151.

confined to after-purchased property; but extended to all: and furnished evidence as to the devisor's intent, that his first will should stand annulled *in toto*, independent of the question of revocation arising from evidence of an intention to revoke, by making a different disposition. That in the case of *Harwood v. Goodright*, there was not sufficient evidence to shew an intention to revoke; because the Court could not see *in what respect* the subsequent disposition differed from the first: but there may be a revocation without any new disposition.

LORD ELLENBOROUGH, C. J. This is as clear a case as ever came before the Court. A person made his will, whereby he bequeathed his personal estate to his mother; and after several intervening limitations, devised the ultimate remainder of his real estate to *T. Philips*. He afterwards acquired a new reversionary estate, which he also wished to dispose of; and his mother having in the mean-time died, and consequently the bequest of his personal property having lapsed, and having also purchased other real estates which he had not before disposed of, he might also contemplate the disposition of those. So circumstanced, he makes another will, which he describes as his *last* will; on which stress is laid: and so indeed it was his *last* will, with regard to his newly acquired property. But it is not enough to say, that by making this will, in terms large enough to include all his property, he must therefore have meant to revoke the former will, unless it be shewn that he has made a disposition of the same property inconsistent with it; especially since the case of *Harwood v. Goodright*, and that of *Hutchins v. Basset*. It is said, that he must have intended either to confirm or revoke the dispositions contained in the first will: but there is a third proposition: he might not have contemplated to do either, but to make a mere collateral disposition of other property; and that seems to have been the case. The cases referred to before the statute of frauds, wherein parol declarations of an intention to revoke in future were holden not to amount to a present revocation are all applicable. The only difference introduced by that statute, was to require certain formalities in the making and revoking of wills: but the same sense conveyed now in writing, as before the statute might have been conveyed by parol, will have the same operation. Even in some cases, where the subsequent disposition somewhat varied from the prior

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prior one, it was holden only a revocation *pro tanto*; and that the two instruments might, in other respects, stand together. All these were fully considered in the cases I have mentioned: and the cases have gone this length, that if it be merely found that *another*, or even a *different* disposition has been made by the testator from that which he had first willed; yet if it do not appear to the Court what that difference is, it is no revocation. Here the deviser has concluded by declaring his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made to that of his will. The plain sense of which is, that instead of having two distinct instruments, he meant to dispose of his personal property, the bequest of which had lapsed by the death of his mother; and also of his real property, which he had acquired subsequent to his first will; and by means of a codicil to connect the two instruments, and make it all one will. But even if this had imported an intention to revoke by making a different disposition in future, it would not, according to the authorities, have amounted to a revocation, unless we knew what the difference was: and after the cases which have been decided, it is impossible to agitate one so infinitely weaker than many of those, and to contend that the prior disposition was revoked in this case.

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LAWRENCE, J. The circumstances relied on to shew that the subsequent instrument was a revocation of the former are, 1st, That the testator calls it his *last* will: to which the true answer was given at the bar, that it is merely a word of form: and he meant no more by it than that it was the last of those instruments which he had executed. Then, 2dly, stress is laid on the declaration of his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made; from whence it was contended, that he must have considered all the rest of his property as undisposed of, besides what he had devised in the prior part of the second will. But it would not be inconsistent with the disposition in the first will, if, in speaking of the residue, he had meant to include the same property that he had before devised: for he only says, That he intended to dispose of it by a future codicil; and *non constat*, Whether he would make any, or what difference in the disposition he had before made. It does not, however, appear that he meant to include the same property in the residuary clause; for he had other property, both real and personal, undisposed of by either of the

the instruments; namely, his personal property, which had lapsed by the death of his mother; and his real property, purchased by him after the date of his first will, which alone he might have intended to dispose of by a future codicil. In neither case, therefore, is the declaration of such intent inconsistent with the disposition made by the first instrument.

Per Curiam,

Postea to the defendant.

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The COMPANY of PROPRIETORS of the MERSEY and IRWELL
Navigation *against* DOUGLAS and Others.

Thursday,
July 1st.

THE declaration stated, That the plaintiffs heretofore, to wit, on the 1st of *January* 1796, to wit, at *Preston, in the county of Lancaster*, were proprietors of and lawfully entitled to, and from thence hitherto have been and still are proprietors of and entitled to the free navigation of a certain river *there*, called *The Irwell*; the water of which said river hath flowed, and ought to have flowed, and from time immemorial, until the obstruction hereinafter mentioned, hath flowed in its ancient and accustomed course, without any obstruction to the said navigation of the said company; yet the defendants, well knowing the premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the enjoyment of the navigation of the said river called *The Irwell*, and to damnify them in the same, to wit, on the day and year aforesaid, at *Preston aforesaid*, in the county aforesaid, wrongfully and injuriously erected, and caused and procured to be erected in, over, and across the said river, above the said navigation of the said company, a certain weir or dam, &c. and wrongfully and injuriously kept and continued the same *so there erected*, for a long space of time, &c.; and thereby and therewith wrongfully and injuriously penned up and obstructed the water of the said river, and prevented the same from flowing down to the said navigation of the said company, in as ample and beneficial a manner as the same otherwise would, &c.; in consequence whereof the plaintiffs were prevented from navigating their vessels, &c. and lost great profits, &c. and expended large sums in forwarding of goods by other means than in the said vessels, &c. to wit, at *Preston aforesaid*, in the county aforesaid. There were other counts, in substance the same.

It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie, be laid in the declaration as a *venue*, or as local description, it will be referred merely to *venue* and need not be proved to be at such place; but it is sufficient if it be at any other place within the county.

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and Irwell
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against
Douglas.

The last count stated, That whereas the plaintiffs heretofore, to wit, on the said 1st of *January* 1796, and long before, were proprietors of and entitled to, and from thence hitherto have been and still are proprietors of and entitled to the free navigation of a certain other river there, called *The Irwell*; the water of which said river hath flowed, &c. from time immemorial, until the obstruction after-mentioned, in its ancient and accustomed course, without any obstruction or impediment; yet the defendants well knowing the premises, but intending to prejudice the plaintiffs, and to disturb them in the enjoyment of the navigation of the said river called *The Irwell*, &c. to wit, on the day and year aforesaid, at *Preston* aforesaid, in the county aforesaid, wrongfully and injuriously *penned up and obstructed the water of the said last-mentioned river*, and prevented the same from flowing in as ample and beneficial a manner as the same otherwise would, &c. concluding as before. The defendants pleaded the general issue.

At the trial before *Rooke, J.* at *Lancaster*, the plaintiffs were nonsuited, for default of proving that the river *Irwell* was at *Preston*: and a rule *nisi* having been obtained for setting aside the nonsuit and granting a new trial, cause was now shewn against it by

[499] *Park, Holroyd, and Scarlett.* Though the action be personal, the injury is local, as well with respect to the injurious act done, as with respect to the property injured, which is real: and by *Comyns (a)* every action founded upon a local thing, shall be brought in the county where the cause of action arises. Where the injury is to land, it must be laid in the proper parish or vill, as well as county, as in trespass *quare clausum fregit*. Then, unless the word *there* be taken as descriptive of the place where the injury was committed, and refer, as it necessarily does, to *Preston*, the declaration would be bad; and if it do so refer, it ought to have been proved as laid, though alleged under a *viz.* being a material allegation. *Lord Ellenborough.* If it be necessary that the nuisance should have a local description, and this be not locally described, the remedy must be sought in another form, and not upon a motion for setting aside a nonsuit on a supposed defect of proof of the allegation of locality.] Upon a motion in arrest of judgment, it would be contended, that the word *there* did refer to *Preston*; and amounted to an

(a) 1 *Com. Dig.* tit. *Action*, 131, N. 5.

allegation that the *Irwell*, in which the nuisance is charged to have been committed, was at *Preston*. [Lawrence, J. Suppose the word *there* was struck out, and the declaration ran thus:— That the plaintiffs, at *Preston*, were possessed of a certain river called *The Irwell*, &c. how would that be defective?] If it did not appear where the river was, it would be sufficient for the plaintiff to sustain his declaration by proving that the river was in another county; which would do away the admitted locality of the action: but in *Goodright v. Strother* (a), on a motion in arrest of judgment in ejectment, for want of an allegation of the vill where the lands lay, it appearing to be alleged that the defendant *at H.* ejected the plaintiff from the said lands, that was holden to amount to a sufficient certainty that the lands lay there. If it would not have been enough before the statute 4 and 5 Ann. c. 16. which enabled the Jury to come from the body of the county to have laid the action in the proper county, without naming the particular vill, nothing in that statute has superseded the necessity of the proof required here. They also mentioned a case of *Shaw v. Wrigley* and others, before *Wilson, J.* at *York*, summer assizes, 1790; which was an action on the case for a nuisance, in erecting a weir, and thereby injuring the plaintiff's mill; which weir was described in the declaration to be at the *Hulbrook*; but was proved in fact to have been erected at a lower part of the same water, called *The Tame Water*; on which the plaintiff was nonsuited, and the Court of *B. R.* afterwards refused to set aside the nonsuit.

Erskine, Gibbs, Wood, Lambe, W. Walton, Raine, and Yates, in support of the rule. Admitting that if the declaration alleged as matter of local description, that the river *Irwell* was at *Preston*, it must be so proved: the question here is, Whether, if the word *there*, be taken to refer to *Preston*, it shall be taken to refer to *venue*, or to *local description*? Now if *venue* only were necessary, the Court will not read it as local description for the purpose of nonsuiting the plaintiff; but will rather intend that he stated enough, and not more than was necessary to sustain his action. The allegation is found in that part of the declaration where the *venue* is usually placed: and it is absurd to suppose that the plaintiffs would allege, as matter of description, that the whole of an extensive line of navigation, vested in them by a public Act of Parliament, was situated at *Preston*,

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(a) 2 Blac. 706.

1802. otherwise than as mere matter of form. What constitutes this a local action is, the locality of the plaintiff's possession within the body of the county; and not the locality of the injury in this or that part of it. If, before the stat. of *Anne*, it would have been necessary to have stated the particular vill, &c. it is no longer so since the statute, unless where local description is necessary. Part of this navigation is in the county of *Chester*; and though the injurious act had been done there, yet if the injurious consequence of the plaintiffs' possession were felt in *Lancashire*, the action was properly brought there. There are three material facts alleged, to which it was proper to lay a *venue*: 1. That the plaintiffs were lawfully possessed of the navigation described to be injured: 2. That the defendants wrongfully set up a weir across that navigation; and 3. That the plaintiffs were thereby injured. No local description was necessary; but it was sufficient that the *gravamen* arose within the county. In cases where a specific judgment is to be given for an abatement of the nuisance, there certainty in the local description is necessary, as in an assize of nuisance, or a *quod permittat*, or an indictment for a nuisance. It need not even have been stated by what means the defendants diverted the water, and the injury was effected; *a fortiori*, therefore, it was unnecessary to give a local description to the injury. It would have been enough for the plaintiffs to have stated their possession of the navigation at any place (by way of *venue*) within the body of the county; and that the defendants *above* the navigation of the plaintiffs *diverted* (a) the water, whereby their navigation was obstructed. If, indeed, a wrong *name* had been given to the river, it might have been a ground of objection, as in the case before *Wilson, J.* at *York*; but the place where the injury was committed is quite immaterial, as in *Drewry v. Twiss* (b), *Frith v. Gray* there mentioned, and *Harrison v. Rock* (c); in which latter, in an action on the case, for stopping the plaintiff's right of way, one of the objections was, That it was not stated in what *town* the way was; but it was over-ruled. They also referred to the last count as more general than the others.

Lord ELLENBOROUGH, C. J. This action is in its nature confessedly local; but the question is, Whether the *gravamen* need be described with any local certainty? and I incline to think it

(a) Vide *Prickman v. Tripp*, *Skin.* 330. (b) 4 *Term Rep.* 556. (c) 3 *Bulstr.* 534.
need

need not; but that it is sufficient if it be laid at any place within the body of the county. A plaintiff in such an action may indeed make it necessary to prove the *gravamen* in a particular place, by giving it a specific local description; as by alleging the nuisance to be standing and being at a certain place particularly described; but in general, such particularity is not necessary: for otherwise, how is a *venue* to be laid to the fact of the obstruction, when that takes place in the higher part of a stream flowing in one county, and the injury is sustained in the lower part of the same stream in a different county in which the action is brought? It is sufficient to describe the substance of the injury, in order to give the other party notice of what he is to defend; and it is sufficient in the form of pleading, to allege the *gravamen* at any place within the body of the county. Therefore, the manner in which it is here stated, ought rather to be referred to *venue* than to local description. If indeed local description were necessary to be laid in this species of action, it might be doubtful whether this manner of laying it were to be referred to the one or the other; but that question would have been better brought before the Court on demurrer, and need not be now considered, though I do not think it necessary to be so laid.

LAWRENCE, J. (a). The ground of the nonsuit at the assizes was on the want of proof of the first allegation in the declaration, That the plaintiffs at *Preston* were proprietors of and entitled to the navigation of the river *there*, called *The Irwell*; it appearing that there was no such river at *Preston*, to which it was supposed to be confined as matter of description. Now there is no occasion for referring the word *there* to *Preston* as matter of description that the river *Irwell* ran at *Preston*, for the purpose of a nonsuit, when it may be rendered intelligible by reading it in another sense, which will support the declaration; and I think it may well be referred to the *calling* of the river *The Irwell* at *Preston*. Then the question is, Whether in this form of action it be necessary to give with certainty the local description of the nuisance complained of?—for if so, we must consider *Preston* as the local description of the place where the nuisance was committed: but I think it was not necessary so to describe it. It is sufficient if the declaration point out the

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(a) Grose, J. being indisposed, was absent.

1802. *gravamen* of the complaint with certainty, enough to enable the defendant to have notice of it, which I think has been done here; and that the naming of the place is to be referred to the *Mersey* venue.

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PANY, &c. of
the MERSEY

and IRWELL

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*LE BLANC, J. It is said there are two parts of the declaration where local description was necessary in stating the cause of action, first in stating the navigation, their local possession of which the plaintiffs complain that the defendants have invaded; and this it is said is alleged to be situated at *Preston* by means of the relative word *there*. But if it be not necessary to allege the particular place where the injury was received, the Court will not read it as giving locality to the river *Irwell* at *Preston*, in order to support a nonsuit for a false description; and I think it would have been sufficient to have said that the plaintiffs were possessed of the navigation of a certain river called the *Irwell*, omitting the word *there* altogether. Secondly, It is urged that local description was necessary to be given to the obstruction complained of, namely, the erection of the weir. But the gist of the action is, that the defendants erected the weir *above* the plaintiffs' navigation; by means of which their navigation was obstructed. It is quite immaterial *where* it was erected above the navigation. It would have been sufficient to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened. Neither is it necessary in actions of this kind, to give a local description either to the property injured, or to the thing which caused the injury; but it is sufficient to state what the property injured was, and that it was so injured by the defendants. In this case therefore it was not necessary to prove that the river *Irwell*, or any part of it, was within the town of *Preston*; or that the weir, by which the obstruction was caused, was within the same place: but the whole may be referred to matter of venue.

Rule absolute.

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ATKINS and Others *against* BANWELL and Another.Friday,
July 2d.

AN action of indebitatus assumpsit was brought by the plaintiffs, as the parish officers of *Toddington*, in the county of *Bedford*, against the defendants as the parish officers of *Milton Bryant*, in the said county, to recover 14*l.* 12*s.* for money paid, laid out, and expended by the plaintiffs for meat, drink, board, lodging, medicines, medical assistance, and other necessities found and provided by them for one *John Mitchell*, his wife and family; to which the general issue was pleaded. And at the trial before *Grose, J.* at the last *Bedford* assizes, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

The law will not raise an implied promise in the parish where a pauper is settled, to reimburse the money laid out by another parish in which he happened to be, in providing necessary medical assistance for him,

The plaintiffs are the parish officers of *Toddington*; and the defendants are the parish officers of *Milton Bryant*. *John Mitchell* was a pauper legally settled at the time of his illness and death, hereafter mentioned, in *Milton Bryant*; but he resided with his wife and family at *Toddington*, and was there suddenly attacked with dangerous illness, which prevented his being removed from the place of his residence to that of his settlement, without endangering his life. The plaintiffs gave notice to the defendants of the illness of their pauper within two or three days after the pauper was so taken ill. The pauper's illness continuing, he afterwards, and about three weeks from such notice, died of such illness in the parish of *Toddington*; and the plaintiffs, as parish officers of that parish, from the time of such notice up to the pauper's death, laid out 14*l.* 12*s.* as well for necessities for the pauper and his family, as for medicines and medical assistance for the pauper, and also on the funeral of the pauper after his death. The present action was brought to recover that sum. The Jury found that there was no express promise of the defendants to pay it to the plaintiffs. The question for the opinion of the Court was, Whether such action be maintainable in law? If the Court should be of that opinion, then the verdict for the plaintiffs was to stand; if not, a nonsuit to be entered.

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BEST, for the plaintiffs, said that there was a moral obligation at least in the defendants to repay the money expended for

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for one of their own parishioners, whom by law they were compellable to maintain within their own parish: and therefore this case fell within the principle of *Watson v. Turner (a)*, where an apothecary recovered against the parish officers for the cure of a pauper of the parish who was taken ill in another parish: there, however, was a special promise to pay the plaintiff's bill after it was contracted.

LORD ELLENBOROUGH, C. J. That last circumstance makes all the difference. A moral obligation is a good consideration for an express promise; but it has never been carried further, so as to raise an implied promise in law. There is no precedent, principle, or colour for maintaining this action.

LE BLANC, J. There was a moral as well as legal obligation to maintain the pauper in his illness in the parish where he was at the time.

Per Curiam,

Let a nonsuit be entered (*b*).

Wilson was to have argued for the defendants.

(*a*) *Seacc. Trin. 7 Geo. 3. Bull. N. P. 129, 147, 281.*

(*b*) *Vide Newby v. Wiltshire, Cald. 527. and Stat. 35 Geo. 3. c. 101.*

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WATERHOUSE *against* Sir RICHARD KING, Bart.

An appointment by the Lords of the Admiralty, of a captain in the navy to be second commander on board a king's ship, is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship; and notice is only taken of one captain in the book of regulations for the navy. And such second captain is entitled to a captain's share of a prize under the king's proclamation. The book of regulations for the navy, submitted by the Lords Commissioners of the Admiralty to the King in Council in 1780, and approved by his Majesty by an order of council, is only directory to the lords commissioners.

THIS was an action for money had and received by the defendant to the use of the plaintiff; to which the defendant pleaded the general issue: and at the trial at the Sittings after last *Hilary* Term at *Westminster*, before *Lawrence, J.* a verdict was taken for the plaintiff for 408*l.* 6*s.* 8*d.* subject to the opinion of the Court on the following case:

In the general regulations and instructions relating to his

Majesty's

Majesty's service at sea, established by the annexed order (a) of* the King in Council, are the following clauses, viz. under the title of "Rank and Command." Article 1. "The established number

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(a) At the Court at *St. James's*, the 7th day of *January* 1730, present the King's Most Excellent Majesty in Council.—Whereas the commissioners for executing the office of Lord High Admiral of *Great Britain, Ireland, &c.* did on the 23d of last month represent to his Majesty at this board, that the orders and instructions, which have from time to time been issued for the better government of the Navy, have been so imperfect, and through length of time become so perplexed, that the officers of his Majesty's navy have been liable to fall into mistakes and omissions in the execution of their duty: and that for preventing any doubts or difficulties of this nature for the future, they have collected into a book the several "rules and orders now in force in the navy, and made such additions and alterations thereto as they thought necessary for that purpose: and have reduced the whole into distinct chapters, and digested the same under proper heads, so that all the officers of his Majesty's ships may, at one view, be duly and sufficiently apprized of the duty of their respective posts." And the said lords commissioners did, at the same time, humbly present the said book to his Majesty for his royal approbation. And whereas the lords of the committee of council (to whom his Majesty thought proper to refer the consideration of the said book) have thus far reported to his Majesty that they have examined into the same, and do apprehend the said book of regulations and instructions may be proper for the service of the navy, and for the maintaining and improving the good order and discipline thereof; and are therefore humbly of opinion, that his Majesty may be pleased to approve of the said book, except in some particulars, which they have thought necessary to be altered; and except likewise all the articles contained therein which relate to the establishing three officers under the title of commodores; as also to the restoring the establishment of pay and servants settled by his late Majesty King *William*, in *February* 1693, on the commission officers of the fleet, in lieu of the pay and servants allowed by the establishment now in force; which last establishment was approved by his said late Majesty King *William* in council, on the 18th of *April* 1700; which two points the lords of the committee did apprehend to be of so great consequence as to deserve a further deliberation, and have therefore humbly proposed to his Majesty that the consideration of them may be postponed, and that the establishment of pay and servants, settled as aforesaid, in the year 1700, and now in force, may for the present be observed. His Majesty was thereupon pleased, with the advice of his privy council, to approve the said book of regulations and instructions, together with the several alterations proposed by the lords of the committee to be made therein: which alterations are accordingly made in the said book: and his Majesty doth hereby order that the further consideration of all the articles therein contained relating to the establishing of three commodores, and also to the restoring the establishment of pay and servants as abovementioned, be postponed; and that the establishment of pay and servants,

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number of flag officers of the navy shall be as follows, viz. one admiral and commander in chief of the fleet, one admiral of the white, and one admiral of the blue; one vice-admiral of the red, one of the white, and one of the blue; one rear-admiral of the red, one of the white, and one of the blue; and no brevet commission shall be allowed." And under the title, "An establishment of sea wages, and of the number of officers allowed to his Majesty's ships," (Article 9.) the wages of other officers and of seamen, with the number of officers allowed to a ship of each rate, are as follows [after which there is a table with the figure I marked under each rate as the number of captains]. The number of flag officers of the navy has been considerably increased, without any authority of the King in Council. Whenever any alteration is made in the number of officers allowed to a ship, according to the statement of the table, it is usual to present a memorial from the lords of the admiralty to the King in Council, and an order is made thereon.

On the 15th of *December* 1786, the following order in council was made, dated 15th *December* 1786: "Whereas there was at this day read at the board a memorial from the Lords Commissioners of the Admiralty, dated the 14th of this instant, in the words following (viz.) Lord *Sydney*, one of your Majesty's principal secretaries of state, having, in his letter of the 31st of *August* last, signified to us your Majesty's pleasure, that one of your ships of war should proceed with the transport vessels appointed to convey convicts to *Botany Bay*, on the coast of *New South Wales*, with a view to form a settlement at that place; and it appearing by the staff establishment of the intended settlement which accompanied his lordship's said letter, that it is your royal intention to appoint the captain of your Majesty's ship employed upon this service, to be governor or superintendant-general of the said settlement, we beg leave to represent to your Majesty that, as it will probably be found expedient for the ship to proceed

vants, which received the approbation of his late Majesty King *William* in council on the 18th day of *April* 1700, and is now in force, be for the present observed. And the said Lords Commissioners of the Admiralty are to give the necessary directions that the several regulations and instructions contained in the said book, which is heretunto annexed, be duly and punctually complied with.

"to some other parts of the coast, or to some of the islands
 "in the *Pacific Ocean*, while the residence of the captain, in
 "quality of governor or superintendant, may be requisite on
 "shore, for the better forming and maintaining the settlement,
 "we are of opinion it will be for the advantage of your Ma-
 "jesty's service, that an officer of superior rank to a lieutenant
 "should, upon such occasions, and at all times in the absence
 "of the captain, have the charge and command of the said
 "ship; and we do therefore humbly propose that your Ma-
 "jesty will be pleased, by your order in council, to authorize
 "us to appoint an additional officer to the said ship, under the
 "denomination of second captain, with the rank of post-cap-
 "tain, and with power to command her in the absence of the
 "principal captain; subject nevertheless to his control, and to
 "such orders and directions as he may from time to time think
 "fit to give for the regulation of his proceedings. That the
 "pay of the second captain be equal to the pay of a captain
 "of a 6th rate, and that he be allowed four servants. His
 "Majesty, taking the said memorial into consideration, was
 "pleased, with the advice of his privy council, to approve of
 "what is therein proposed, and to order, as it is hereby ordered,
 "that the Lords Commissioners of the Admiralty do appoint
 "an additional officer to the man of war that shall proceed with
 "the transport vessels appointed to convey the convicts to *Bo-*
 "*tany Bay*, under the denomination of second captain, with the
 "rank of post-captain," &c. (following the precise terms of the
 above-mentioned recommendation).

The rank immediately superior to that of lieutenant is that of
 captain. Shortly after the making the above order in council,
 Captain *Phillips* of the navy was appointed governor of *Botany*
Bay in *New South Wales*: and being about to depart for his go-
 vernment, he and Captain *Hunter* received from the Lords Com-
 missioners of the Admiralty their respective commissions of com-
 mander and second commander of his Majesty's ship the *Sirius*,
 a sixth rate ship, with 160 men, similar to the two commissions,
 dated the 17th *July* 1794, hereinafter set forth. On that occa-
 sion Captain *Phillips* was allowed seven servants, and Captain
Hunter four. In the year 1794, Captain *Hunter* was appointed
 to succeed Captain *Phillips* in the government of *Botany Bay*:
 and on his departure, the following commissions issued to him
 and the plaintiff (viz.)

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“ By the commissioners for executing the office of lord high
 “ admiral of *Great Britain and Ireland*, &c. and of all his Ma-
 “ jesty’s plantations, &c. To *John Hunter*, Esq. hereby ap-
 “ pointed commander of his Majesty’s armed vessel the *Reliance*.
 “ By virtue of the power and authority to us given, we do here-
 “ by constitute and appoint you commander of his Majesty’s
 “ armed vessel the *Reliance*, willing and requesting you forth-
 “ with to go on board, and take upon you the charge and com-
 “ mand of commanding in her accordingly; strictly charging
 “ and commanding all the officers and company of the said
 “ armed vessel to behave themselves jointly and severally, in their
 “ respective employments, with all due respect and obedience
 “ unto you their said commander; and you likewise to observe
 “ and execute the general printed instructions, and such orders
 “ and directions as you shall from time to time receive from us,
 “ or any other your superior officers, for his Majesty’s service.
 “ Hereof nor you, nor any of you may fail, as you will answer
 “ the contrary at your peril; and for so doing this shall be your
 “ warrant. Given under our hands, and the seal of the office of
 “ Admiralty, this 17th of *July* 1794, in the 34th year of his
 “ Majesty’s reign.

(Signed)

“ A. GARDNER.

“ P. AFFLECK.

“ CHAS. MIDDLETON.

“ By command of their Lordships,
 PHILIP STEPHENS.”

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“ By the Commissioners for executing the office of Lord
 “ High Admiral, &c. To *Henry Waterhouse*, Esq. hereby ap-
 “ pointed second commander of his Majesty’s armed vessel the
 “ *Reliance*, with the rank of commander, and with power to
 “ command her in the absence of the principal commander; sub-
 “ ject, nevertheless, to the control, and to such orders and di-
 “ rections as he may from time to time receive from the said
 “ principal commander, for the regulation of his proceedings.
 “ By virtue of the power and authority to us given, we do here-
 “ by constitute and appoint you second commander of his Ma-
 “ jesty’s armed vessel the *Reliance*; willing and requiring you
 “ forthwith to go on board, and take upon you the charge
 “ and command of second commander in her accordingly;
 “ strictly charging and commanding all the officers and com-
 “ pany

“pany of the said armed vessel, the *Reliance*, to behave themselves jointly and severally, in their respective employments, “with all due respect and obedience unto you their second commander; and you likewise to observe and execute the general printed instructions, and such orders and directions as “you shall from time to time receive from us, or any other your “superior officers, for his Majesty’s service. Hereof, nor you, “nor any of you may fail, as you will answer the contrary at “your peril: and for so doing this shall be your warrant. Given “under our hands, and the seal of the office of Admiralty, the “17th of *July* 1794,” &c.

(Signed as the last.)

No memorial was presented from the Lords of the Admiralty on occasion of the above commissions; nor was any order of the King in council made relative thereto. The said *John Hunter* was allowed four servants, and the plaintiff two. The Lords of the Admiralty have since, once on a similar occasion, where a captain in the navy has been appointed governor of *Botany Bay*, issued to such governor and to another, and to a junior captain, concurrent commissions, of the like tenor with those above set forth. Sometime in the year 1795, previous to the breaking out of the *Dutch* war, the *Reliance*, a sloop with 84 men, whilst on the *Botany Bay* service, with the said *John Hunter* and the plaintiff actually on board, and others his Majesty’s ships of war, by orders from the Lords of the Admiralty, detained several *Dutch* vessels. These ships were afterwards sold, and the produce thereof is now in the hands of the defendant, to be distributed as a donation, according to the King’s proclamation of the 25th *November* 1795, for distribution of prizes taken from the subjects of the *United Provinces* during the late hostilities, which direct as follows: “That the neat produce of all prizes “which were or should be taken by any of his Majesty’s ships “or vessels of war, should be for the entire benefit and encouragement of his Majesty’s flag officers, captains, commanders, and other commissioned officers in his Majesty’s “pay, and of the seamen, &c. on board his Majesty’s said ships “and vessels at the time of the capture: and that such prizes “might be lawfully sold and disposed of by them and their “agents, after the same should have been to his Majesty adjudged lawful prize, and not otherwise. The distributions “should be made as follows: the whole of the neat produce be-

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“ing first divided into eight equal parts. The captain or captain of any of his Majesty’s said ships or vessels of war, who should be actually on board at the taking of any prize, should have three-eighth parts; but in case any such prize should be taken by any of his Majesty’s ships or vessels of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing and assisting in the capture, should have one of the said three-eighth parts; the said one-eighth part to be paid to such flag officer or officers, in such proportions, and subject to such regulations as are thereafter mentioned, viz. The captains of marines and land forces, sea lieutenants, and master, on board, should have one-eighth part, to be equally divided amongst them (physicians appointed, &c. and actually on board at the time of a prize taken, &c. to share with the sea lieutenants, &c.) The lieutenants and quarter-masters of land forces, secretaries of admirals or of commodores, with captains under them, boatswains, gunners, purser, carpenter, masters’ mates, chirurgeon, pilot, and chaplain on board, should have one-eighth part, to be equally divided between them.” [Then follows the remaining proportions, distributed among other inferior classes of persons by name, on board the King’s ships, ending with seamen and marines, and “all other persons doing duty and assisting on board.”] “Provided that if any officer, being on board any of his Majesty’s ships of war at the time of taking any prize, should have more commissions or offices than one, such officer should be entitled only to the share or shares of the prizes which, according to the abovementioned distribution, should belong to his superior commission or office.” [Then follows an injunction to all commanders of his Majesty’s ships, &c. taking any prize, to transmit to the Commissioners of the Navy a true list of the names of all the officers, seamen, &c. and others who were actually on board at the time; which list should contain the quality of the service of each person on board, and be subscribed by the captain or commanding officer, &c.; and also a direction to the said Commissioners, to grant a certificate of such lists transmitted to them to the prize agents appointed by the captors, and also such lists from the muster books of any such ships of war, &c. as the said agents should find requisite for their direction in paying the produce of such prizes, &c.]

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The sum given by the verdict is a captain's share of the proceeds of the said ships. During all such time as the plaintiff was so commissioned to the *Reliance*, he was mustered, borne on the ship's books, received his pay, and during the absence of the said *John Hunter*, as well before as after the detention of the said *Dutch* ships, was corresponded with, and had letters of service addressed to him from the Lords Commissioners of the Admiralty, those of the Navy and Victualling, and from the flag officers under whose command the ship was, *as captain of that ship*; and as such, during Captain *Hunter*'s absence, attested seamen's letters of attorney and wills, which were allowed and passed by the proper officer at the office of the Commissioners of the Navy. But whenever Captain *Hunter* and the plaintiff were on board, they performed their respective duties agreeable to their several commissions. A prize list of the officers, seamen, and others, who were actually on board the *Reliance* at the time of the said capture, was duly made out and signed by the plaintiff, and transmitted by him to and approved by the Navy Board, and by that board handed over to the defendant; in which list the plaintiff was set down as second commander of the said ship. The question for the opinion of the Court is, Whether the plaintiff be entitled to recover?

Burton for the plaintiff contended, 1. That the power of the Lords Commissioners of the Admiralty was not restrained to the appointment of one captain only on board each ship. The book of regulations made under the order of council of 1730, was not intended to control the general powers delegated to them by the King's commission for exercising the office of High Admiral, which is conceived in the most extensive terms (*a*); and without which powers, the well-being of that most important service could not be secured. These regulations were drawn up by the Lords Commissioners themselves, for his Majesty's approbation, in order to give them greater weight in the service;

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(*a*) The Admiralty commission (which was not stated in the case, though agreed to be referred to) is in very general terms; being "to execute and perform all things which belong or appertain to the office of High Admiral of Great Britain, &c. as well in touching all those things which concern our navy and shipping, as those which concern the right and jurisdiction of and appertaining to the office of High Admiral; and to make orders and issue warrants for the repairing and preserving our ships, &c. already built and to be built; and for fitting and furnishing, arming, victualling, and

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but it is not to be inferred from thence that they could not have promulgated the same by their general authority; for the whole is done in the name of the Admiralty. The order of council does not purport to be an *order to* the Admiralty to adopt the regulations in question, which it would have done, had it been so intended. The Admiralty have always, and still continue to exercise, the more important functions of commissioning the several ships, and appointing the different officers to their respective commands, to which the power of regulation is merely collateral; and having before varied the rules existing before 1730, they have the same authority to vary them again; and they have in fact increased the number of flag officers since that period. But if there were any doubt on that point, at any rate, the plaintiff's appointment was authorized by the second order of council, of the 15th *December* 1786; and the very reason of the thing shews, that it was intended as a general regulation in the new established colony, and not merely confined to the first appointment of Captain *Hunter*, as second captain under Captain *Phillips*. If, then, the plaintiff were properly appointed to the station which he held, of second captain or commander on board the ship, 2dly, he is entitled to a captain's share of the prize-money, under the King's proclamation.—There is no other class to which he can belong.—He had all the attributes of a captain, in the absence of the first captain: letters of service were directed to him by the several public boards as such; and he was mustered and ranked as such, and acted in all other respects in that capacity. If he had been guilty of any offence, he could only have been tried by a court-martial in the character of captain. The Prize Act, 33 *Geo. 3. c. 66.* vests the prize in the flag-officers, commanders, and other officers and seamen, &c. in such shares as the King, by his proclamation, shall appoint. There is nothing in the latter to confine the number of officers, captains, or others, on board each ship; but the words apply to

“and setting forth such ships and fleets as you shall receive directions for;
 “and also to direct entertainments, wages, and rewards, for such persons as shall
 “be employed in those services, or any thing appertaining thereto.” And afterwards, reciting “that all offices, places, and employments, belonging to the
 “Navy and Admiralty, are properly in the trust and disposal of the Lord High
 “Admiral, it declares and grants that all such offices, places, and employments,
 “as shall fall void, shall be given and disposed of by the Commissioners, or
 “any three of them.”

every

every person bearing the commission of captain, let the number be what it may. It could not be the intention of the King to restrain the division of the prize to those only who were ordinarily appointed in the several stations on board of ship, although other officers were appointed by competent authority, who had shared the dangers and difficulties of the enterprise with them. The plaintiff's appointment as *second* commander, *eo nomine*, does not exclude him from sharing under the general term of *captain* in the proclamation. It would have been implied, though not so expressed, and was only used in contradistinction to the *first* commander or captain, who, it cannot be denied, would be entitled to share; and in whose absence the plaintiff acted in all respects as *captain* or *commander*, without any other relative appellation.

Gaselee, contra, denied, 1st, That the Lords Commissioners had authority to appoint a *second* captain on board a ship; the regulations made under the order of council of 1730, restraining them to appoint more than one captain or commander to each ship. It is true, the Admiralty commission gives them general powers, which in terms might warrant this appointment; but that must be governed by usage; and it is not inconsistent with a controlling power lodged in the Crown, of giving the Lords Commissioners certain rules for the government of their general discretion. Then the order of council of 1730 shews, that the Admiralty Act is in subordination to the King in council; for thereby certain regulations, which were proposed by the Lords Commissioners for the approbation of the King, are sanctioned by him; in which it appears, that only *one* captain is allowed to each ship, though the number of lieutenants varies according to the rate of it; and from thence it also appears, that the plaintiff was not allowed so many servants, in proportion to the number of men, as by the regulations he was entitled to; namely, only two instead of four; which shews that his appointment was not under the first order of council. Neither was it warranted by the second order of council: for that was made upon a special occasion, and was afterwards *junctus officio*. Besides, there too the second captain was directed to be allowed four servants; and here the plaintiff had only two. [*Lawrence, J.* The second order does seem to be confined to the particular instance.] 2dly, Even if the appointment were valid, under the general authority of the Admiralty, the plaintiff

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had no right to share prize; for in this instance, it could not be claimed under the Prize Acts, but purely from the King's bounty: the seizure having been made before any letters of reprisals had issued. The distribution of prize, under the King's proclamation, is calculated according to the number and rank of the persons who are to share in it: one-eighth to the flag-officers, three-eighths to the captains, &c. The flag-officers, however, if several, do not share in equal proportions, but according to their rank: but the captains all share alike, considering them equal in rank to each other, and consequently allowing but one to each ship. If, therefore, one who is only second in rank on board one ship, is to share in common with his own and all the other captains, that alters the proportion of the whole, and gives to that ship a larger share than the rest. By these means, the smallest ship in a squadron might take the greatest share. It is not necessary to consider what the effect would have been if Captain *Hunter* had been on shore, and the plaintiff commanding on board at the time of the capture; but at any rate, he was only appointed commander *in the absence* of the proper captain: and, according to *Lumley v. Sutton* (a), though the plaintiff in fact acted as captain on board, yet the proper and lawful captain and commander may still be entitled to the captain's share. The plaintiff having been liable to be tried by a court martial as a captain, for any breach of duty, cannot vary the question of prize. Captain *Lumley* was so liable; and he also acted and was addressed as captain by letter, and paid as such; and yet he was holden not entitled to share prize as captain.

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Burton, in reply, observed, As to the number of servants allowed to the plaintiff being fewer than was directed by the order of 1786, the number allowed depended upon the proportion of men to the ship: which was fewer in this instance than in the other, and the relative proportion was the same. That it was sufficient to entitle the plaintiff to prize, if he were *de facto* appointed to act as captain of the ship in his own right; and not as in *Lumley v. Sutton*, in the place of the lawful commander.

LAWRENCE, J. (b). Two questions have been made: 1st, Whether the plaintiff were appointed by any competent autho-

(a) 8 Term Rep. 221.

(b) Lord *Ellenborough*, C. J. gave no opinion, having been concerned as counsel in the cause; and *Grose*, J. was absent, from indisposition.

rity to be second captain of his Majesty's armed vessel the *Reliance*? and, 2dly, if so appointed, Whether he be entitled to a captain's share of the prizes in question? As to the first, the Lord High Admiral had a general and very extensive authority to commission what ships, and appoint what officers he pleased to act on board them. The same authority is now delegated to the Lords Commissioners in very general terms, who are empowered "to execute and perform all things which "belong or appertain to the office of High Admiral." No doubt, the commissioners are liable to receive particular orders from the Crown, touching all matters which fall within their cognizance; but these are only directory: and if they issue any commission contrary to such orders, they may be guilty of misconduct in their office; but that does not avoid the commission itself. It was competent therefore for the Lords of the Admiralty to appoint as many captains as they pleased on board this ship. Then it is said, that the plaintiff was only appointed second commander *during the absence* of the first from the ship; but that is not so: for he was appointed second commander *generally*, and was to assume the command of the ship in the absence of the first commander, whom he was to obey when present. But his appointment of second commander was general, without reference to the absence of Captain *Hunter*; and the commission requires the plaintiff generally to take on himself the charge and command of second commander; and all the officers and company of the vessel are enjoined to pay due respect and obedience to him as such; the Admiralty evidently considering that the duty of a second commander was before known to the person to whom the commission was directed, and those who were required to obey him as such. He was no supernumerary or occasional officer, as contended for: his pay accrued, and he was entitled to his allotted number of servants as well when Captain *Hunter* was on board as when he was absent. This therefore is not like the case of *Lunley v. Sutton*, to which it was compared: for there the plaintiff was clearly a supernumerary: he was neither rated, paid, nor returned as captain of the ship, nor had any allowance of servants. Then taking the present plaintiff to be only an officer *de facto*, appointed to the rank of second commander of the ship, and acting as such, to be sure the words of the proclamation are sufficiently large to comprehend him in the distribution of prize: and I do not

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see that the word *Captains* must mean the captains of different vessels: it includes all of that rank, though there be more than one appointed to some particular vessel.

LE BLANC, J. The plaintiff is entitled to all the advantages of the rank which he held on board this vessel, unless his appointment were made without any authority whatever. But though it be not stated, as it ought to have been, in the case what the commission of the Lords of the Admiralty is, yet we may take it to be the same in this respect as that of the Lord High Admiral formerly; and we know that he had a general authority to appoint what officers he pleased on board the ships. Then the plaintiff was, by his commission, directed to go on board this vessel as second in command, with the rank of commander, and with power to command the vessel in the absence of the principal commander. This was not an appointment of him as a supernumerary, like the case of Captain *Lumley*; but generally to act as second commander; and the ship's company were required generally to obey him as such; and in the absence of the first captain, he was to have the principal command. His appointment therefore was permanent; and in effect, it was only saying that, during the time the first captain was on board, the plaintiff was to act in subordination to him as second in command. Then taking him to be well appointed by those who had a competent authority, and to have been second captain whether the principal one were present or absent, I see no reason for saying that he is not entitled to share as captain in the prize, within the words of the proclamation, which are general, comprehending all officers *commanding* on board ships at the time of the capture.

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LAWRENCE, J. further observed, That upon a review of the plaintiff's commission, it appeared that the object of it was not so much to limit his ordinary authority in the ship during the time Captain *Hunter* was on board, but rather to increase the ordinary power of the latter, by giving him authority, though resident on shore, to issue his command to the captain commanding on board.

Postea to the plaintiff.

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MAN *against* SHIFFNER and ELLIS.Friday,
July 2d.

THIS was an action for money had and received by the defendants for the plaintiff's use. Plea *non assumpsit*. The cause was tried at the Sittings after Michaelmas Term, 1801, before Lord Kenyon, C. J. when a verdict was found for the plaintiff for 500*l.* subject to the following case:

R. Heath, a planter in Jamaica, for a valuable consideration in money, paid to him by one Allen, as agent to the plaintiff and L. Parkinson, drew bills of exchange on Messrs. Atherton and Astley, of Liverpool, the merchants of Heath, in favour of the plaintiff and Parkinson; which Atherton and Astley refused to accept (not having funds in their hands of the drawer Heath); and the same were returned. The share of Parkinson in these bills was afterwards paid; and on the 18th July, 1800, Heath shipped in Jamaica, on board the *Hero*, Captain Lightfoot, for Liverpool, twenty-five tierces of sugar, to be delivered to the order of the shipper, for which Captain Lightfoot signed a bill of lading; and upon which bill of lading, delivered by Heath to Allen, the following indorsements were made:—(1st indorsement.) “Captain Lightfoot. Sir, If Messrs. Atherton and Astley will engage to pay the net proceeds of the within-mentioned “twenty-five tierces of sugar to the order of W. Allen, you will “in that case deliver them to the said Messrs. Atherton and “* Astley; but if they do not so engage, &c. you are then to “deliver the same to the order of the said William Allen, who “is entitled and hereby authorized to recover and receive the “amount insured on the same in case of loss, having received “value for the same this 19th day of July 1800. Richard “Heath.”—(2d indorsement.) “To Captain Lightfoot. Sir, If “Messrs. Atherton and Astley engage to pay the net proceeds of “the within-mentioned twenty-five tierces of sugar to L. Parkinson, or his order, you will in that case deliver the said sugar to “the said Messrs. Atherton and Astley, otherwise you are to deliver them to the order of the said L. Parkinson; value received “of him in Jamaica. (Dated) 23d July 1800, (and signed) William “Allen.”—(3d indorsement.) “I hereby assign, transfer, and “set over to James Man, pursuant to the directions of “W. Allen, all the right, title, property, and interest vested in “me to the within bill of lading, and to the contents, by virtue

The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods, by the consignor, after he had directed his correspondent to make the insurance, takes it, subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent; but the broker has no sub lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person.

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That one who once had a lien on goods in his possession, if he afterwards parted with the possession, could not stop them in their transit to the principal, nor revest his lien by procuring a bill of lading to be signed to his order by the carrier. The only ground on which the defendants could have retained for their claim upon *Atherton* and *Astley* was, if they had effected the insurance for them without knowledge of the principal; but as that is negated by the facts found, it brings it precisely within the case of *Maanss v. Henderson (a)*, which negatives the broker's lien against the principal in such a case for the debt of the factor, by whom the order for insurance was given.

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Park, contrà, admitted the general principles laid down in the cases cited, distinguishing this from *Maanss v. Henderson*; because there, *Jennins*, the factor or middleman, claimed no lien on the policy as against the principal; and here the lien is claimed not merely for the defendant's demand against *Atherton* and *Astley per se*, but for *Atherton* and *Astley's* demand against *Heath*, the original consignor: and here the possession of the defendants is, to all intents and purposes, the possession of *Atherton* and *Astley*, whose servants they were, and under whose immediate orders they acted in effecting the insurance. A man may have a virtual possession through the agency of another. If the goods had arrived at *Liverpool*, and the warehouses of *Atherton* and *Astley* being too full to receive them, they had employed the defendants, as their brokers, to keep the goods for them, the legal possession would still have remained in the factors, as between them and their principal; though the brokers might have acquired a sub-lien for the amount of the warehouse rent. Many cases of lien have been established by the party's putting his mark on the goods, while in the actual possession of a third person; as in *Ellis v. Hunt (b)*. In that view, even the case cited of *Daubigny v. Duval (c)* is in favour of the defendants; for there the possession of the pawnee was holden so much the same as that of the factor, that the principal could only recover the goods from such pawnee by proving a tender to the factor of what was due to him. Then if the factors had a lien on the policy, in the hands of their brokers, for the amount of their general balance, as against the original consign-

(a) Ante, 1 vol. 335.

(b) 3 Term Rep. 464.

(c) 5 Term Rep. 606.

or, the latter could not vary that lien by afterwards consigning the goods to the plaintiff; and the money received by the defendants upon such policy, must be subject to the same lien as the policy itself. It is money had and received to the use of the persons conscientiously entitled to it; and this being an equitable action, the plaintiff can only recover according to conscience and good faith (*a*). The law creates the lien of the factors; and if the plaintiff, as consignee of the goods, will avail himself of their act in effecting the policy, he must do it subject to their claims in respect of such act done. The validity of the factor's lien on the policy, notwithstanding a subsequent alteration in the consignment of the goods, is in terms admitted by Lord *Mansfield*, in delivering the judgment of the Court in *Godin v. The London Assurance Company* (*b*), where he puts the very case in question.

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Rose, in reply, observed, That *Atherton* and *Astley* never could be said to have had even an equitable claim on the policy; for the consignment of the goods was only made to them *conditionally*, in case they undertook to pay over the net proceeds; which they had not done. That at most, they could only have the same lien on the policy as they would have had on the goods insured, if they had arrived; and therefore as the property, in the net proceeds, was anticipated, nothing could be retained but the amount of the premium paid for effecting it.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court (*c*) in favour of the defendants. Their opinion, he observed, was not founded on any right which the defendants had to retain the policy from the plaintiff, on the ground of having a lien on it to satisfy their claim on *Atherton* and *Astley*; but considering them as the servants of *Atherton* and *Astley*, who were entitled to hold the policy, as against the plaintiff, who claimed from *Heath*, the consignor, until their claim on *Heath* was satisfied, on the score of their general balance.

(*a*) This argument was addressed to a doubt thrown out at first by the Court, as to whether the defendants could set up any claim by *Atherton* and *Astley* against the original consignor, to whose use the money had not been received by them, as before payment by the underwriters, the plaintiff had become entitled to the goods insured.

(*b*) 1 *Burr.* 493.

(*c*) *Grosé*, J. was absent, being indisposed.

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and also the customary heir of the said testator, as to the copyhold estate of the said testator, in the manor of *Kennington*, in the will mentioned, and which was duly surrendered to the uses of the will. About five months before the testator's death, in conversation with his wife, in the presence and hearing of *Joseph Simpson*, her father, upon her requesting him to alter her maiden name, as it then stood in his will, to her married name of *Pierson*, the testator said, *it was not of any consequence; for that he had consulted a professional gentleman, who told him that the will, as it then stood, was a good and sufficient will; and observed, he had thereby amply provided for her and her children:* and a short time before his death, in another conversation, in the presence and hearing of *Edward Young*, relative to the testator's late solicitor's bill of costs, wherein was charged five guineas for making his will, he, the testator, observed, *that he thought it a very exorbitant charge; for that he himself copied the will.* The will and duplicate thereof are in the testator's own hand-writing. The testator, at the time of his death, was indebted to divers persons, as well by simple contract as otherwise, to a very considerable amount; and which debts are yet due and unpaid. The testator died seised of no freehold estate; but was, at the time of making his said will, and also at his decease, seised as of fee at the will of the lord, according to the custom of the manor of *Kennington*, of the copyhold estate in the will mentioned, holden of the manor, of a considerable annual value. The testator's personal property being small, and very insufficient for the payment of his debts, which were of great amount, the plaintiff, a creditor, filed his bill in the Court of Chancery, on behalf of himself and the other creditors of the testator, against *M. S.* the executor, and the other parties claiming interest in the real and copyhold estate, devised by the will under the disposition thereby for the usual accounts and administration of the personal assets, towards discharge of the testator's debts, and to have the deficiency raised by sale or mortgage of the real and copyhold estates under the charge made by the will for that purpose. The case was argued in *Easter Term* last.

Barrow for the plaintiff. The will had all the proper requisites of such an instrument to pass real estate: and none of those things happened after the execution of it which the statute of frauds

frauds (a) points out as the only means by which such a will shall be revoked. Admitting however, that by the authorities marriage* and the birth of a child amount to an *implied* revocation, still that can only be where there is nothing to rebut that implication, as there is in this case. In *Doe v. Lancashire* (b), Lord *Kenyon* assigned as a reason why marriage and the subsequent birth of a child amounts to a revocation, because it is *a tacit condition annexed to the will itself, at the time of making it*, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. Under such circumstances, it is more reasonable to presume that he never meant the will to take effect at all, than that his wife and children should be wholly unprovided for: but that reason cannot apply where the testator foresaw the existence of these relations, and provided for them accordingly. Here are besides other circumstances, which very much outweigh the presumption of an implied *intention* in the testator to revoke; and this intention being implied from matter of fact collateral to the instrument itself, may well be rebutted by other facts denoting a contrary intention. As in *Brady v. Cubitt* (c), Lord *Mansfield* said, “that he was clear that this presumption, like all others, “might be rebutted by every sort of evidence.” He then adverted to the two conversations of the testator subsequent to his marriage and the birth of children, in which he recognized his will; and relied on another circumstance, namely, the provision for payment of debts by charging the real estate, which would be defeated by setting aside the will, the personality not being sufficient for that purpose. The question will be, Whether natural love and affection for a wife and children, or the justice due to creditors, be the more weighty and worthy consideration?

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(a) 29 Car. 2. c. 3. s. 6.

(b) Term Rep. 49, 50.

(c) Dougl. 31, 39. In Mr. Justice Buller's note of his own opinion in this case, which I have in MS. he says, “That parol evidence was always admissible to rebut, though never to raise an equity. And so it was holden “by this Court in the case mentioned of *Goodright d. Hodges v. Langfield* (1), “and *Lake v. Lake*. That if the subsequent written papers and the parol “evidence in this case were received, which he thought they must be, it was “perfectly clear and so admitted, that there was no intention in the testator “to revoke his will, and consequently on the whole no ground for the Court to “imply it.”

(1) Q. This is the case called *Rogers v. Langfield*, in the printed report.

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This circumstance has not occurred to be considered in the prior cases of implied revocations of this sort; and though natural love and affection be a sufficient consideration in law, yet at least it is voluntary, and not to be preferred to creditors, who are purchasers for a valuable consideration. And here there is less reason for presuming an intention in the testator, either co-existent with or subsequent to the time of making his will, that the just provision for his creditors should be annulled by the subsequent marriage and birth of children, whom he had, by the same instrument, provided for.

R. Smith, contra. It is admitted that a subsequent marriage and the birth of a child amount in law to a revocation of a prior will, whether such revocation be founded on a presumed alteration of intention in the testator, or on a tacit condition annexed to the will at the time of making it, as was said in *Doe v. Lancashire* (a). Two questions then arise: 1. Whether any circumstances exist in this case to rebut the presumption of an intention to revoke? 2. Whether such extrinsic circumstances as are mentioned, can be received in evidence at all? 1. The provision in the will for the same person who was afterwards his wife, and the children whom he might afterwards, accidentally, have by her, cannot do away the effect of the tacit condition of revocation annexed by law to his subsequent marriage and the birth of a legitimate child; because, at the time of making the will, he did not contemplate the objects in the legal relation in which they afterwards stood to him. *Voet Pandect. lib. 28. tit. 2. s. 2.* Suppose one by will made immediate provision for several, at that time most nearly connected with him, and by a remote limitation, also provided for a feme and such children as she might have, and he afterwards married her,—the possibility of such provision would not satisfy the presumption or tacit condition of law that his will should be revoked. Besides, it is clear that the children intended by him in his will, were natural children; and the law will not take cognizance of those as of legitimate children. Bastards are excluded from succession. The law will not raise an use in favour of them under a covenant to stand seised to uses (b). Courts of equity, proceeding on the same distinction, will supply the want of a surrender of a copy-

(a) 5 Term Rep. 58.

(b) *Worsley's case*, Dy. 374. 1 *Ander.* 79. S. C. and other cases collected by Mr. *Hargrave* in a note to *Co. Litt.* 123. a.

hold, to make good a defective will or conveyance in favour of a legitimate, but not of a natural child (*a*). So a child born before marriage was holden (*b*) not entitled to share with other children born after the marriage of the same parents, under a devise to *children* generally. Next, the charge on the real estate for payment of debts can make no difference; for the question is not, what the testator intended, or ought to have intended, or what hardship or injustice may accidentally be worked in a particular case; but the revocation is a consequence of law, operating upon the events which have happened; upon the presumption that no man would leave his wife and children without provision. But considering the revocation on the ground of *intention*, the inclination to provide for creditors is not so strong as for children. Besides, it does not follow that though a man intended to revoke his will, he thereby determined not to pay his debts; for he might intend to do that in his lifetime, or by another will. At any rate this would only apply to simple contract creditors, who may be considered as guilty of laches, in not recovering their debts, or getting security for them. He also adverted to the evidence of intent, to be collected from the particular declarations, on which he commented; and observed, that it might be as well contended to be sufficient if the testator had left a written paper unattested, expressing that he had originally made his will, without adverting to his subsequent marriage, &c. which would revoke it; but that having found that the provisions contained in it were equally convenient to his then altered state, he thereby declared, that his will should be revived as applicable to such state. But that would directly militate against the letter of the statute of frauds and the received construction of it. 2dly. This being the case of a revocation, by presumption of law, cannot be rebutted by evidence of a particular intent that the will should stand. Many cases of implied revocations must happen, which cannot go upon the ground of a subsequent *intention* in the testator to revoke; as where the pregnancy of the wife is unknown to the husband before his death: or if known, and the intention to revoke then attaching, and continuing to his death, the will could not be set up again by a miscarriage, subsequent to the husband's death. These implied revocations then can

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(*a*) *Fursaker v. Robinson*, 1 E. Cas. Abr. 122, recognized in *Tudor v. Anson*, 2 Ves. 532.

(*b*) *Cartwright v. Fawcay*, 5 Ves. Jan. 539.

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only stand consistently with the statute of frauds, on the ground stated in *Doe v. Lancashire*, namely, of a tacit condition annexed to the will at the time of its execution, and not on the presumption of a subsequent intention to revoke, which might with more reason be rebutted by evidence of a contrary intention. Putting the doctrine of such implied revocations on the ground of such tacit condition presumed by law, gets rid of much of the difficulty arising upon the statute of frauds; because the facts of marriage and the birth of a child being notorious, cannot be fabricated by means of frauds and perjuries, which the statute meant to guard against: but all these mischiefs will be let in again, if recourse can be had to evidence of declarations, in order to rebut the legal presumption. The mere existence of the will does not aid the presumption arising from such conversations, otherwise it would be evidence of a republication, which it is not (a); though that would be a less dangerous innovation on the principle of the statute of frauds. In several cases the opinions have fluctuated, whether parol evidence may be admitted to rebut an *implied* revocation; Lord C. J. *Eyre* in *Goodtitle v. Otway* (b) thought they might: but Lord *Alvanley*, when Master of the Rolls, thought otherwise in *Gibbons v. Caunt* (c); and so did the Lord Chancellor in this very cause (d). It is true that in the report of *Lugg v. Lugg* in Lord *Raymond* (e), such evidence is said to be admissible; but no notice is taken of that in the report of the same case in *Salkeld* (f); and at any rate it was extrajudicial; for the will was ultimately revoked. The only express authority, therefore, for the reception of such evidence, is that of *Brady v. Cubitt* (g), which has been since questioned in the instances beforementioned: and there was another decisive ground for that determination, independent of the admissibility of this sort of evidence, namely, that the will, if revoked, was set up again by the subsequent codicil properly executed, which referred to it.

Barrow, in reply, urged, that either the case was altogether within or beside the statute of frauds: if within it, the will

(a) He referred to *Acherley* and *Vernon*, and the cases there cited (*Com. Rep.* 381, and other books) as establishing this against *Hall v. Dunch*, 1 *Vern.* 329, and other cases where parol declarations were received as evidence of republication.

(b) 2 *H. Blac.* 522.

(c) 4 *Ves. Jun.* 546.

(d) 5 *Ves. Jun.* 664.

(e) 1 *Ld. Ray.* 441.

(f) *Salk.* 592.

(g) *Dougl.* 51.

must stand good, not being revoked by any of the means therein pointed out. If beside it, and implied revocations were to be admitted upon evidence of facts dehors the will, by the same rule counter evidence was admissible to rebut such implication. That this had been expressly decided in some cases, and never judicially determined otherwise. That here, the children being legitimate, it was unnecessary to enter into any legal reasoning upon the difference between those and illegitimate children; and that in *Brady v. Cubitt*, Lord Mansfield put this very case of a provision by will for children *when he should have any*, and concluded that a subsequent marriage and birth of children would not be a revocation of such a will.

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Curia advisare vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court. After stating the case, and the 6th section of the statute of frauds (29 Car. 2. c. 3.) which enacts "That no devise in writing of lands, &c. nor any clause thereof, shall at any time after, &c. be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, in his presence, and by his directions and consent," &c.—He proceeded thus:

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The difficulty of reconciling the doctrine of implied or presumptive revocations of a will of lands, with the express provisions of that section, was originally very considerable. This point, however, namely, that such revocations are not excluded by the statute of frauds, has been considered as settled ever since the case of *Christopher v. Christopher*, in the Exchequer in 1771; by which revocation of wills (implied not only from contradictory acts inconsistent with the existence of the will and its operation upon the property devised, as feoffments made or recoveries suffered of the lands devised, though to the same uses as before; and bargain and sale, though without enrolment) have been sustained: but revocations have been also holden to be necessarily implied or presumed from so material a change in the circumstances of the testator as is occasioned by subsequent marriage and the birth of a child. The doctrine of implied revocations, originally borrowed from the civil law, and applied to bequests of personal estate (as in the case of *Overbury v. Overbury*, 2 Show. 242, and *Lugg v. Lugg*, 1 Lord Raym. 441, and

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Salk. 592) has been since denied in some degree by the Court of Common Pleas, in *Driver v. Standring*, 2 *Wils.* 90, and much doubted by Lord *Hardwicke* in *Parsons v. Lanoe*, 1 *Ves.* 191, in its application to devises of *land*. That it is however applicable to devises of land has been so solemnly settled upon argument in the case already mentioned of *Christopher v. Christopher*, in the Exchequer in 1771, and has been since so frequently recognized in different Courts at various times; as for instance, at the Cockpit in *Spragg v. Stone* in 1773; in the King's Bench, in the cases of *Brady v. Cubitt*, *Dougl.* 31, and of *Doe v. Lancashire*, 5 *Term Rep.* 49; and upon many other occasions, that it must now be considered as a general proposition of law, that marriage and the birth of a child, *without provision made for the objects of these relations*, of themselves operate a revocation of a will of lands. The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason as it is put by Lord *Kenyon* in *Doe v. Lancashire*, 5 *Term Rep.* 58, namely, as being "a tacit condition annexed to the will when "made, that it should not take effect if there should be a total "change in the situation of the testator's family," than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply (and upon this subject particularly, after what was said by Lord *Mansfield* in *Brady v. Cubitt*, *Dougl.* 39.) only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case where the same persons who after the making of the will stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination. There is not, therefore, in this case, that total change in the situation of the family, and that total destitution of provision for those who ought to be the objects of the testator's care and protection (although the provision be made for them under a different character), which can vacate the will on the ground of a supposed tacit condition, that it should be void upon a total change in the situation

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situation of the testator's family, and *a total want of provision* for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. Indeed, it is not very easy to comprehend the legal effect of *an intention to revoke*, unless manifested and carried into execution by some act in *pais*. It is certainly true, that the law is not as favourable to bastards, not *in esse*, as it is to legitimate children. In a variety of cases it will not raise an use in their favour, in consideration of blood, upon a covenant to stand seised to uses; nor will the want of a surrender of copyhold to the use of a will be supplied in favour of a natural child: nor can such child properly take by the description of issue. And in other cases also, from uncertainty in the terms of description of and reference to its *parents*, a bastard is prevented from taking at all. As however in this case the children were, at the time when the will speaks, viz. at the death of the testator, born and legitimate, no question of defective description arising out of the words, "*in case I shall have any child or children by her*," can be made; nor was the policy of the law, respecting marriage, eventually contravened in this case (upon which point, the case in *Cro. Eliz.* 510. proceeds); inasmuch as the children who now claim under the will were not unborn bastards, but born and legitimate at the death of the testator. After what has been said already, and that the will in question is not under these circumstances vacated, on the ground of any tacit condition annexed to the will at the time of its making, nor on the ground of any intention to revoke, to be presumed in favour of a wife and child or children unprovided for (the fact upon which such presumption could be formed not existing in the present case), it becomes unnecessary to consider whether the revocation generally holden to arise from subsequent marriage and the birth of a child, without provision made for the objects of these relations, can be *rebutted by parol declarations* in favour of the will. It is enough to say that if a revocation, which would otherwise be implied, can be so rebutted, it is rebutted in the present instance: for it is stated, that about five months before the testator's death, in a conversation with his wife in the presence and hearing of *Joseph Simpson*, her father, upon her requesting him (the testator) to alter her maiden name, as it then stood in his will, to her then married name of *Pierson*, he said, *that it was not of any*

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consequence; for that he had consulted a professional gentleman who had told him that the will as it then stood, was a good and sufficient will; and observed, that he had thereby amply provided for her and her children. Upon the whole therefore, if there be any question which at this time of day can be agitated with effect, whether implied revocations of wills of land can be allowed at all consistently with the statute of frauds, our decision leaves even that question untouched; inasmuch as we sustain the will as yet in force, and unrevoked by any implication whatsoever. Neither does our decision clash with the doctrine of a tacit condition annexed to the will, viz. that it should be void in the event of a marriage and children without provision; inasmuch as that condition, viz. of marriage and of the birth of children unprovided for, has not taken effect in this instance. And the question, How far implied revocations are competent to be rebutted by the parol declarations of the testator? is also left untouched, for the reason before given. Therefore, without impugning any one decision upon the subject, and in conformity with them all, upon whatever various grounds they may have proceeded, we feel ourselves warranted in considering this will, made in favour of those who at the time of the testator's death had become his wife and children, as in full force, and not revoked under the circumstances stated in this case.

Postea to the Plaintiff.

*Saturday,
July 3d.*

BARCLAY against COUSINS.

The profits of
a cargo em-
ployed in trade
on the coast
of Africa, are
an insurable
interest.

THIS was an action on a policy of insurance, dated the 27th August 1799, and effected by the plaintiff, as agent for and on account of one *Richard Wells*, on the ship *Jonah*, at and from *Barbadoes* to the coast of *Africa*, during her stay and trade there, and at and from thence back to her port or ports of discharge in the *West Indies*, at a premium of 25 guineas *per cent.* with various returns for convoy. The policy was declared to be on profits valued at 2000*l.* and was underwritten by the defendant. The declaration contained averments, that the ship sailed upon the voyage insured, with a cargo of goods and merchandises on board; and that the said *Richard Wells* was interested in the profits to arise and be made from the sale and disposal

*disposal of the said cargo of goods and merchandises, to the amount insured; and stated a total loss by capture. The defendant pleaded the general issue, and paid the premium into Court. At the trial before Lord Kenyon, at the Sittings at Guildhall, after last Trinity Term, a verdict was found for the plaintiff for 221*l.* 5*s.* subject to the opinion of this Court on the following case:*

In February 1799, Richard Wells shipped a cargo of goods on his own account, on board his own ship the *Jonah* at Barbadoes, to be carried on a trading voyage to the coast of Africa. The invoice value of the ship and cargo was about 5880*l.* In April 1799, the plaintiff received an order from Mr. Wells to insure 6000*l.*, on this ship and cargo; in consequence whereof he effected an insurance to the amount of 8470*l.* to cover the sum of 6000*l.* ordered, and the premiums of insurance thereon; which insurance was declared to be on the ship and cargo at and from Barbadoes to the coast of Africa, during her stay and trade there, and at and from thence back to her port or ports of discharge in the West Indies. On the 13th of August following, the plaintiff received a letter from Mr. Wells, directing the insurance in question, which was thereupon accordingly effected. The said ship sailed from Barbadoes on the 29th of March, 1799, upon the voyage insured, and arrived at Cape Mount, her port of discharge in Africa, on the 21st of July following; and thereupon the agents of the assured began to unload and sell her cargo, and with part of the produce thereof purchased thirty slaves; and on the 28th of August following she was captured by three French frigates; but was afterwards given up by one George Hewitt, for the purpose of conveying English prisoners to a British port, and arrived at Sierra Leone on the 6th of September, together with the said thirty slaves, and the remainder of her cargo, and a number of English prisoners; but was soon after deserted by the said George Hewitt and part of her crew; and her original captain refusing to take the charge of her, Captain Gray, the then acting governor of that settlement, gave the command thereof to one Walter Stott, who accordingly took possession thereof. That by the direction of the said Walter Stott, the thirty slaves were unshipped and sent to Bance Island, where they were afterwards sold, and the remainder of the cargo was landed and sold at Sierra Leone, and produced the sum of 46*l.* 6*s.* 6*d.* That the said brig afterwards departed for Barbadoes,

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Barbadoes, with prisoners on board, where she arrived, and where the Court of Admiralty adjudged to the said *Walter Scott* and the then crew of the said brig, one full eighth part of the net proceeds thereof, and of the cargo on board her at the time she was taken possession of as aforesid. The question for the opinion of the Court is, Whether the plaintiff is entitled to recover?

This case was very fully argued first in *Easter Term*, 41 *Geo.* 3. by *J. B. Warren* for the plaintiff, and *Giles* for the defendant; and again in last *Easter Term*, by *Park* for the plaintiff, and *Adam* for the defendant: but as the principal arguments and authorities were noticed by the Court in their judgement, which they took time to consider of till this Term, it is unnecessary to state them in another form.

LAWRENCE, J. (in the absence of *Grose*, J. who was indisposed) now delivered the opinions of *Grose* and *Le Blanc*, Justices, and his own.

The case states, that the insured shipped on board the ship *Jonah* a cargo of goods, to be carried on a trading voyage: so that it appears that he had an interest in the profits to arise from a cargo, which was liable to be affected by the perils insured against. And the question is, If, on an insurance made on the profits to arise from such cargo, the plaintiff can recover? As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer: and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to: and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in

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case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune, be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce, by their having the means of preserving their capitals entire, which would continually be lessened by the ordinary expences of living, if there were no means of replacing that expenditure, in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss, the party is a sufferer by not having used his money in a way which might, with a moral certainty, have made a return not only of his principal but of profit: and it is but playing with words to say that, in such case, there is no loss, because there is no possession; and that it is but a disappointment. Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. *Roccus*, an *Italian* jurist, inquiring how goods that are lost are to be valued, has in his *Notabilia de Assecurationibus*, No. 3, this passage: “Distingue aut merces fuerunt æstimate pro certâ quantitate tempore contractus assecurationis, et tunc non sumus in dubia quia dicta quantitas æstimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis *Romam*, et tunc æstimatio inspicienda est *Rome*. Aut assecuratio fuit facta *simpliciter*, de solvendo æstimationem seu valorem mercium, in casu periculi, si navis perierit, et tunc inspicere debet tempus obligationis, et prout tunc valebant, debet fieri æstimatio, et sic *damnum* quod assecuratus patitur in amissione rei, non *lucrum* faciendum consideratur.” And for this he cites *Santerna*, a *Portuguese* lawyer, *de Assecurationibus*, part the 3d, num. 40 and 41; in which book there is a long disquisition to shew that, in this latter case, the profit on the goods is not to be paid, but only the value at the time of the insurance. So that it seems the insurance of profits is so far from being inconsistent with the nature of insurance, that, *e contrâ*, *Santerna* thinks it necessary to shew by argument, that the profit is not to be considered in all cases; and that where the assurance is made *simpliciter*, then *lucrum non spectatur*.

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And *Stracca*, another *Italian* lawyer, agrees with *Santerna* in his Gloss, No. 6. In * *France* such assurances were unlawful; but that depends, according to *Valin*, on the ordinance of the marine, which also forbids insurance upon freight; and the reason given by *Valin* for making these ordinances, with respect to the one and the other, is the same; so in *Holland*, it appears from *Bynkershoek's* Quæstiones Juris Privati, book 4, c. 5, that such insurances cannot be legally made there; but that is by the positive laws of that country; notwithstanding which, the practice has so generally obtained to insure expected profits, as that in a case he there states, the majority of the Judges of the Court where the question arose, determined in favour of the assured; and those who opposed that decision, rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance. In this country, there is no law forbidding such insurance; unless it could be shewn that the insurer had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the stat. 19 Geo. 2.; and that they are not considered as contracts inconsistent with the general nature of insurance is proved, by the instance put of an insurance on freight; which, as was very truly argued at the bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandise: and by the cases of *Grant v. Parkinson*, in *Marshall*, 111, and *Park*, 267, which was an insurance on the profits of a cargo of molasses; and the case of *Henrickson and Walker*, and *Henrickson and Margetson*, *Mich.* 1776 (a). The authority of *Grant and Parkinson*, as applied

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(a) Mr. Justice Lawrence read the following note of that case at the time:

Henrickson v. Margetson, and the same against *Walker*. These were two actions on the same policy, against two different underwriters. It was a policy of insurance at and from Bordeaux to *Hamburgh*, on *imaginary profit*. The declaration stated the policy 14th December, 1775, on the ship *Thomas*, of Bremen, on indigo valued at 9,600*l.*; under which policy was a memorandum, viz. the following is on *imaginary profit* at $3\frac{1}{2}$ per cent.; and in case of loss, to pay without further proof of interest than this policy. The plaintiff averred, That the ship was not a ship belonging to his Majesty, or any of his subjects; and that the *imaginary profit* mentioned in the said memorandum was, and is understood and meant "to be the profit which the said cargo of indigo would produce upon the sale thereof at *Hamburgh*, if the

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applied to this case, has been attempted to be gotten rid of by observing that the thing insured there was the profits of a specific cargo: but in that respect the two cases do not differ; for this is an insurance on a specific cargo; and we have no ground to say that the profits of a cargo to be exchanged in the *African* trade, from which exchange the profits will arise, are not, to use the expression of Lord Mansfield in *Grant* and *Parkinson*, pretty certain; admitting, for the sake of the argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be so much uncertainty as to the profits, as to make it not possible to insure them without the policy being a wagering contract. This, however, we cannot presume of the returns to be made from an adventure, undertaken according to a long established course of trade like that in question, in which numbers have been engaged to great advantage for a continued succession of years. It has been objected to this sort of insurance, that the subject having no physical existence, cannot be insured. This objection would hold against insuring freight, and bottomree, and respondentia interest. Again, that the goods might be going to a losing market; in which case, the assured would gain by the loss of his

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the same should arrive there in safety." That the defendant became an assurer of 200*l.* on the said imaginary profit; that the cargo of indigo was on board to the value insured; "and that the plaintiff was interested in the cargo of indigo and the imaginary profit thereof;" and that the ship and cargo were on the voyage lost, by the perils of the sea; and the cargo and all profit thereof wholly lost to the plaintiff.

The cause was tried at the Sittings after Trinity Term, 1776, at Guildhall, before Lord Mansfield, when a verdict was found for the plaintiff.

In Michaelmas Term, 1776, a motion was made for a new trial. It appeared by the report, that the ship was totally lost off Scilly; but that all the cargo, except one barrel of indigo, was saved and carried to Hamburg in another ship, at the expence of the underwriters; and the question made on the motion for a new trial was, Whether the ship being lost, but the cargo carried to Hamburg in another ship, the assured could recover as for a total loss of the profits? But the Court held, that there should not be a new trial: that the underwriters were not at liberty to send the cargo to Hamburg at what time and in what ship they pleased. Lord Mansfield said, the meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo; but the market varies, and may depend on twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost.

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goods; but if that were the case, it would be evidence on *non assumpsit*, as it would prove either that the plaintiff was not damnified as to profit by the loss of the goods; or that at the time of the loss, he had no interest in the thing insured. It was further objected, that there can be no average nor abandonment; but that objection does not hold in the present case; for if there be only a partial loss, the assured will only be liable to pay for the expected profits on the goods lost; and there may be an abandonment of the profits by abandoning the goods from whence the profits are to arise: and as to general average, there would be no difficulty in the case of a valued policy; and in the case of an open policy, the difficulty would be no greater than in ascertaining the damages in case of loss: the impossibility of doing which, in *every* case, will not prove that an insurance can be made on profits in *no* case. A considerable time has elapsed [552] between the first and second argument of this case, in consequence of a writ of error in the Exchequer-Chamber in another case, the decision of which might have had weight in favour of the defendant, had it been determined otherwise than it has been. The grounds of that decision we are not acquainted with, so as to say whether they will support this case: but as that determination does not militate with the opinion Mr. J. *Grose*, Mr. J. *Le Blanc*, and I have formed, and I may add that of Lord *Kenyon* on hearing the first argument, we do not think it fit that we should longer delay the judgment of the Court.

Postea to the plaintiff.

Saturday,
 July 3d.

SCAMMELL and Others *against* WILKINSON and Another.

Prohibition lies to the Spiritual Court, if a suit be instituted to obtain a general probate of the will of a woman made during her coverture, though with her husband's consent, and though she survived him: for he could not by any assent of his enable her to dispose by any will made during the coverture of property which she might acquire after his death, but only of property over which he himself had a disposing power. But a feme covert may make a will disposing of property which she only has *in autre droit*, as executrix, without her husband's consent.

THE plaintiffs declared in prohibition, and stated that the defendants, *Catharine Wilkinson* and *John Bagwell*, instituted a suit in the Prerogative Court of the Archbishop of *Canterbury* against *Susannah Scammell* and the other plaintiffs, being next of kin of *Sarah Pearce*, for the purpose of their (the defendants) bringing into and leaving in the registry of the said Prerogative Court the probate of the pretended last will and testament of the said *S. Pearce*, widow, deceased,

theretofore

theretofore granted to the said *Catharine Wilkinson* (theretofore *Catharine Pearce*, spinster), and the said *John Bagwell*, the executors named in the said pretended will, under certain *limitations* therein set forth; and of shewing cause why the same should not be revoked and declared void, and why a general probate of the said pretended will should not be granted to the said executors; alleging as a ground for granting such a general probate, that one *William Stevens*, then deceased, whilst living made his will, dated the 28th of *December* 1776, and therein appointed his sister *Sarah Pearce*, deceased, then the wife of *Richard Pearce*, his sole executrix and residuary legatee; who in *September* 1782, duly proved the said will of her brother: and that her husband, *Richard Pearce*, made his will, dated the 23d of *January* 1789, and thereby gave the residue of his personal estate to his wife (*Sarah Pearce*) for her sole use and benefit; and, in case of her decease in his lifetime, gave the said residue to the executors or administrators of his wife; directing the same to be disposed of in such proportions, manner, and form, as his wife by her last will, or any writing purporting to be her last will, and executed by her either in his lifetime or after his decease, should give, direct, or appoint. And that by his said will he authorized and empowered her to make any such will for the purposes aforesaid. And that the said *Richard Pearce* appointed the said *Catharine Wilkinson* (then *Catharine Pearce*) and *John Bagwell* executors and trustees for his said wife. Alleging further, that on the said 23d of *January* 1789, the said *Sarah Pearce* did, with the privity, consent, and approbation of the said *Richard Pearce* her husband, make and duly execute her will in writing: which will was read over in the presence of her said husband, who testified his consent to such will, and his approbation thereof, by subscribing his name thereto as a witness; and that the said *Sarah Pearce* did thereby dispose of the rest, residue, and remainder of her estate, whereof she might be entitled to at the time of her decease, or over which she might have any power to dispose, either by the will of her husband, or by or under the will of her late brother, *William Stevens*, or by any other means whatsoever, unto the said *Catharine Pearce* (now *Wilkinson*); and appointed her and *John Bagwell* the executors. That *Richard Pearce* died on the 28th of *February* 1789, in the lifetime of the said *Sarah Pearce*, who survived

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survived her husband twelve hours, and died without revoking her will; and that in *March* 1789, the said *Catharine Wilkinson*, (then *Catharine Pearce*) and *John Bagwell* proved the said will of the said *Richard Pearce*; and that in the same month, probate of the will of the said *Sarah Pearce* was incautiously granted to *Catharine Wilkinson* (then *Pearce*) and *John Bagwell*, with a limitation to the rights and interest which she took under the will of her husband: whereas she died testate to all intents and purposes whatsoever, possessed of and entitled to certain property which could not be administered under the limitations of the probate: and on these grounds the libel prayed that the Judge of the Prerogative Court would revoke the probate of the will of the said *Sarah Pearce*, and grant to the said executors a general probate of the said will, without any limitation whatsoever. The declaration further stated, That in answer to this allegation the plaintiffs pleaded, that *Sarah Pearce*, being a married woman, could not make a will but by the authority of her husband; and that her husband gave her no such authority; for that his assent became wholly ineffectual, by reason of her having survived him; and that his attesting her will was evidence of his assent so far only as *Sarah Pearce* had bequeathed and disposed of such effects as *Richard Pearce* had then the power of disposing of by his own will; and that her will was valid only as to such estate and effects as by virtue of the will and testament of her husband she had a power to dispose of: notwithstanding which answer and his Majesty's writ of prohibition, the said *Catharine Wilkinson* and *John Bagwell* are proceeding to obtain such general probate, &c.

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To this declaration the defendants pleaded that *William Stevens*, in the said recited libel mentioned, made his will on the 28th of *December* 1776; and thereby appointed his sister, *Sarah Pearce*, then the wife of *Richard Pearce*, sole executrix and residuary legatee as above alleged: that *Richard Pearce* and *Sarah Pearce* made their respective wills as stated in the libel: and that the will of *Sarah Pearce* was fully understood and assented to by her husband in every disposition, matter, and thing therein contained; wherefore they prayed judgment and his Majesty's writ of consultation to be granted, &c. To which there was a general demurrer and joinder in demurrer.

‡ This case was first argued in *Trinity Term* last, by *Little-
dale*

dale in support of the demurrer, and *Wigley*, contra; again in *Michaelmas* Term last, by *Gibbs* in support of the demurrer, and the *Attorney General*, contra; and a third time in the last Term by Civilians, namely, by *Dr. Lawrence* in support of the demurrer, and *Dr. Swabey*, contra.

The Court took time to consider of their judgment; and now

LAWRENCE, J. (in the absence of *Grose*, J. who was indisposed) delivered the opinion of *Grose*, and *Le Blanc*, Justices, and his own; Lord *Ellenborough*, C. J. having been engaged as counsel in the cause when it was argued the two first times.

After stating the pleadings as before set forth, the question is, Whether, under the circumstances, a general probate ought to be granted of the will of *Mrs. Pearce*?—and if not, Whether there ought to be a writ of prohibition directed to the Judge of the Prerogative Court in which the suit is pending?

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In this case, property of three different descriptions may be in question: 1st, That which was the property of the husband, *Richard Pearce, proprio jure*;—2dly, That which passed by the will of *William Stevens*; part of which may have been reduced into possession in the lifetime of *Richard Pearce*;—3dly, Property which *Sarah Pearce* the wife, may by possibility have acquired subsequent to her husband's death.

Over the first she could have no power of disposition, but what might be acquired by her husband's assent. Over the second she had a power, without her husband's assent, to transmit by will what was not reduced into possession, to some other, to whom it would pass by right of representation to her brother, the former owner; but that which was reduced into possession must pass as the first description of property; which was the husband's *proprio jure*. This doctrine is to be found in *Swinburne*, 82; and in what Lord *Thurlow* says in *Hudson v. 1 2 Brown*, 543. Over the third description of property she could have no power of disposition derived from her husband, for as he never had any interest in it, she can derive none from him; and as she had in respect thereof no representative power of transmission, the question, as to the third description, must stand on the foot of a will made by a feme covert, as to which *Swinburne* says, part 2d, c. 9, rule 5, "If the wife do overlive the husband, yet the testament is void, if the marriage is not good; the reason is, yet the husband

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because she was intestable at the time of the will making.” And according * to 4 Co. 61. b. “the law of *England* will not allow of any custom that a feme covert may make any devise; for the presumption that the law has, that it will be made by the constraint of the husband:” and if this reason be applied to testaments, she can make none, unless it be by the consent of the husband, and to his prejudice; in which case a restraint cannot be presumed: and according to the case referred to in *Brown*, the general rule is, that a feme covert cannot make a will without the consent of her husband, but of things *in autre droit*; and the argument of one of the learned Civilians, who assisted us by the information he gave, by which he would distinguish the next of kin from the husband, *scil.* that they have no rights but in cases of intestacy, does not hold throughout; for as to things in action, the husband can only claim as the next of kin does, *scil.* as the administrator of the wife. If then a feme covert cannot make a will without her husband’s assent, except of things she has as executrix, and if the effect of a general probate would in this case operate on goods of the third description, *i. e.* on goods acquired after the husband’s death, such general probate should not be granted; and though, generally speaking, the Ecclesiastical Court has exclusive jurisdiction over the wills of all persons dying in a testable state, yet where, on the pleadings, the object of the Ecclesiastical Court must be taken to be the establishment of the will of a person not in a testable state at the time of making it, the question is to be considered just as if she had continued in such state to her death; for the object of the Court is to give effect to a will, which, by the general rules of law, can have no effect. Formerly, where the will was not only of personalty, but also of lands, prohibition used to be granted *quoad* the lands. 2 Roll. Abr. 315. b. 10. But that is not so done now, as the probate as to the lands is no evidence either way, being a proceeding *coram non judice*. Salk. 552. So that where the matter is partly within their jurisdiction and partly not, a prohibition may be granted as to that which is not, if it will answer any purpose. How then does this case stand? As to the will, *quoad* the husband’s effects, and those of *William Stevens*, a limited probate or administration *cum scripto annexo* may be granted; but not as to the effects acquired subsequent to the husband’s death: and if the Ecclesiastical Court should grant

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grant it, it will not be in vain, as being upon the face of it a proceeding *coram non judice*, as in the case of lands, and therefore the prohibition not unnecessary. And as to the argument that the Prerogative Court will not grant probate further than they ought to do, that would apply against granting prohibitions in all cases before sentence; but the rule is, if it appear by the libel that the matter be not within the jurisdiction of the Spiritual Court, a prohibition lies after sentence, or before: and where the matter for prohibition appears on the face of the libel, it need not be pleaded. *Salk.* 551. In this case, on the face of the proceedings, it appears that the Prerogative Court is applied to, to grant a probate, which will give to a will, made by a woman during her coverture, the effect of a will made during her widowhood and discoverture. And it is not impossible but that the Ecclesiastical Court may in this case grant such probate: for, by the civil law, a feme covert might make a will, and so she might by the canon law. *Lindwood*, 173. But as Mrs. *Pearce*, besides what she could dispose of by the will of her husband, to which the limited probate is confined, had a power to make a testament, and appoint an executor of the goods she had as executrix, to which that probate does not extend, the probate to be granted in this case may be more extensive than what the plaintiffs insist it should be. But of that it will be to be judged by the proper Court, when such further limited probate is applied for.

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The KING against the Inhabitants of KIRDFORD.

Saturd.
July 1. 1801.

ON an appeal against an order of two justices, for the removal of *Margaret*, the wife of *John Jeale*, and her three children, from the parish of *Kirdford*, in the county of *Sussex*, to the parish of *Ripley*, otherwise *Sund*, in the county of *Surrey*. The respondents, in order to establish a settlement of *John Jeale*, in *Ripley*, called one *H. Luff*, who was the occupier of a rateable tenement in *Kirdford*; but who was not rated in the last poor-book made for that parish, nor in any rate made since the 19th of *February* 1801. It was admitted that *Luff* was hitherto out of the several rates, for the express purpose of qualifying him to be a witness in any appeal which might take place respecting the settlement of *Jeale* or his family: which settlement

A parish-ner having rateable property in the parish, but omitted to be rated, for the purpose of qualifying him to be a witness in any appeal which might take place respecting the settlement of *Jeale* or his family: which settlement

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had then become an object of litigation; the Sessions rejecting the testimony of *Luff* as incompetent, and the respondents not being able to prove their case in any other manner than by his testimony, the order was quashed, subject to the opinion of this Court, Whether upon the facts above stated, *Luff* was or was not a competent witness?

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Rose and *Courthope*, in support of the order of Sessions, contended, That the witness *Luff* was incompetent, on the ground of having an interest in the question before the Court; and distinguished this case from that of *R. v. Prosser* (a), which was on a question of rating; where the appellants themselves objected to the rate, because they were omitted; and called a witness, who had himself rateable property in the parish, but was not rated, in order to prove their own rateability. *Buller, J.* observed, That though the appellants succeeded, it would not follow that the witness ought to be rated: and there too, if the appellants thought proper to wave the objection to the witness's interest, no other party had any right to object to him. But here the decision of the question involves in it a burden on the parish as permanent as the witness's interest; and therefore he is eventually interested in the consequences, as he may be put on the next rate, while the same burthen subsists. It is an additional reason for rejecting the witness's testimony, that the parishioners, by whom he was called, have intentionally omitted him in the rate, in frand of the statute 43 *Eliz.*; and though in the case of the *Sadlers' Company v. Jones* (b), it is said, that three of the company were disfranchised, in order to give evidence, yet it is noted, that they declared upon the *voir dire*, that they had no assurance of being received again: and in *Brown v. The Corporation of London* (c), Lord *Holt*, under similar circumstances, rejected the witness, because the judgment of disfranchisement, being erroneous for want of a summons, might be avoided. Here then, no assurance by the parishioners could prevent the witness from being put on the rate, and the omission may be supplied on appeal; and here the interest is not destroyed, but merely suspended. In actions on the statute of Hue and Cry, the Legislature found it necessary to make the hundredors competent witnesses, on account of their liability to a future rate.

(a) 4 *Term Rep.* 17.

(b) 6 *Mod.* 166.

(c) 11 *Mod.* 225.

Garrow, contrà, was stopped by the Court.

LORD ELLENBOROUGH, C. J. In order to disqualify a witness on the score of interest, it must be an actual existing interest at the time, and not merely one that is expectant. The rule is well laid down in *Rex v. Prosser*, and in other cases, particularly one mentioned by Mr. Justice *Buller*, in that case before Baron *Burland*, at *Salisbury*, that a liability to be rated is no objection to the competency of the witness. Here it was perfectly contingent at the time, whether the witness would be interested or not: he might die, or part with his property before the making of the next rate. The case put under the statute of hue and cry does not apply; for there, in truth, all the inhabitants are the real defendants in the cause, though, as they could not all be put on the record, provision was made by the statute in that respect. It was therefore necessary to have an express law for making one a competent witness who was actually liable as a party at the time. It is said, that this is not like the case of disfranchising a corporator; but it is so; for, *pro tempore*, he is not interested: and the ground on which Lord *Holt* rejected the witness in the case alluded to was, because the judgment of disfranchisement was void, for want of a previous summons to the corporator: and therefore he had not been disfranchised. Here the witness could not be rejected on the mere ground of an expectant interest.

LAWRENCE, J. This is attempted to be distinguished from the case of *Rex v. Prosser*, because that was on a question of rating; but in *Rex v. South Lynn (a)*, and *Rex v. Little Lancelley (b)*, which were questions of settlement, the same rule was adopted; and in the former, Lord *Kenyon* said that there was no reason to depart from the opinion given in *Rex v. Prosser*. The same point, which was ruled in the case mentioned by Mr. Baron *Burland*, was also ruled by Mr. Justice *Buller* in the case of *Deacon v. Cook, Taunton Spring Asses.* 1784. In that case the question was upon the boundaries of two parishes. He held that a parishioner, actually rated, was competent witness to extend the boundaries of his parish, though he admitted such as were only liable to be rated.

LE BLANC, J. declared himself of the same opinion, and referred to Lord *Kenyon's* opinion in *Rex v. South Lynn*, and the point; and that there was no distinction between the competency of such a witness on questions of rating and questions of settlement.

(a) 5 Term Rep. 667.

(b) 6 Term Rep. 117.

1802.

The KING
against
The Inhabitants of
KIRDFORD.

tlement. That by taking the witness off the rate, his immediate interest was taken away; and that if there were any impropriety in the conduct of the parish in that respect, however it might go to the witness's credit, it could not make him incompetent.

Case remanded to the Sessions to be reheard.

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Saturday,
July 23d.

Where the memorial of an annuity registered under the statute 17 Geo. 3. c. 26, stated, that "the bond, warrant of attorney, judgment, and indenture in the memorial mentioned, should not be set aside. The facts appeared to be these: In April 1783, Sir C. F. Ratcliffe, for a valuable consideration, granted an annuity of 300*l.* to W. Sampson, for the life of Lady Ratcliffe, with her concurrence, which was in part secured upon a sum of 10,000*l.* three per cent. reduced stock; in which she had a life interest. This annuity was assigned by Sampson several years before his death, which was in 1796, to Eade, and by Eade to Mr. Davenport; whose widow, the present claimant, derived title to it from him. Between the time of granting the annuity and the present application, the grantor and grantee, Mr. Davenport, Mr. Constable, the grantee's attorney who prepared the deeds, and Mr. Powell, one of the witnesses to the deeds, were all dead. Sir C. F. Ratcliffe having a reversionary interest in part of the stock after his wife's death, in 1795 sold the same to Sir R. Mackreth; and soon after a suit was instituted in the Court of Exchequer by Sir Robert against Sir Charles and Lady Ratcliffe and their trustees, and Mrs. Davenport: in which it was decreed (in 1797) that the surviving trustee should transfer the principal stock to Sir Robert, and certain other persons, in trust for the several subsisting interests; and it was then agreed between all the parties, that the trustees should pay over the arrears of the annuity to Mrs. Davenport; and empower her banker to receive the growing dividends for her use: and the annuity was accordingly paid, without objection.

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distance of near 20 years, and after the principal parties and witnesses to the transaction be dead, will set aside the

Ex parte Sir ROBERT MACKRETH, Knt.

THIS was an application by Sir Robert Mackreth, to set aside an annuity for a defect under the stat. 17 Geo. 3. c. 26. s. 1. in not having distinctly stated in the memorial registered, the names of the several witness to the several instruments for securing the annuity. The rule in form called upon Mrs. Elizabeth Davenport to shew cause why the bond, warrant of attorney, judgment, and indenture in the memorial mentioned, should not be set aside. The facts appeared to be these: In April 1783, Sir C. F. Ratcliffe, for a valuable consideration, granted an annuity of 300*l.* to W. Sampson, for the life of Lady Ratcliffe, with her concurrence, which was in part secured upon a sum of 10,000*l.* three per cent. reduced stock; in which she had a life interest. This annuity was assigned by Sampson several years before his death, which was in 1796, to Eade, and by Eade to Mr. Davenport; whose widow, the present claimant, derived title to it from him. Between the time of granting the annuity and the present application, the grantor and grantee, Mr. Davenport, Mr. Constable, the grantee's attorney who prepared the deeds, and Mr. Powell, one of the witnesses to the deeds, were all dead. Sir C. F. Ratcliffe having a reversionary interest in part of the stock after his wife's death, in 1795 sold the same to Sir R. Mackreth; and soon after a suit was instituted in the Court of Exchequer by Sir Robert against Sir Charles and Lady Ratcliffe and their trustees, and Mrs. Davenport: in which it was decreed (in 1797) that the surviving trustee should transfer the principal stock to Sir Robert, and certain other persons, in trust for the several subsisting interests; and it was then agreed between all the parties, that the trustees should pay over the arrears of the annuity to Mrs. Davenport; and empower her banker to receive the growing dividends for her use: and the annuity was accordingly paid, without objection.

warrant of attorney, the merits of such objection not depending on testimony lost by

tion,

tion, till the year 1800. In 1797, it was agreed between Sir *R. Mackreth* and Mrs. *Davenport*, that she should release part of Sir *C. F. Ratcliffe's* estate which Sir *Robert* had also purchased, and on which she had a prior charge in respect of the annuity, he in return confirming the annuity, and giving his own bond in addition, as a further security for it; which was accordingly done; and such further security was memorialized. In 1801 Sir *Robert Mackreth* filed a bill in Chancery against Mrs. *Davenport* and others, to enforce a redemption of the annuity, according to the terms of the securities, as insisted on by him to that effect; to which she put in her answer (alluded to in part in the affidavit of Sir *Robert Mackreth* aftermentioned); pending which suit Lady *Ratcliffe* died; and then the present application was made to this Court upon Sir *Robert's* affidavit, stating, that at the time of granting the annuity, the grantor executed a bond, and a warrant of attorney to confess judgment, and also a certain indenture, assigning the dividends of the said 10,000*l.* stock, and a deed poll or letter of attorney, empowering the grantee, *W. Sampson*, to receive such dividends, all dated the 29th of *April* 1783. That in the memorial of the annuity it is stated, that "the said bond, warrant of attorney, indenture, and deed poll, are witnessed by *J. J. Powell*, and *J. Bowles*, *R. Pitches* and *T. Constable*, of," &c. That Mrs. *Davenport*, in her answer upon oath, put in to a bill filed against her and others by the deponent, admitted that the said bond, warrant of attorney, and indenture were in her custody; and further states as follows: "That the names of the subscribing witnesses to the said bond, warrant of attorney, and indenture are *J. Powell* and *J. Bowles*, of," &c.

The objection ultimately relied on (a), was, that it must be taken on the face of the memorial, that all the four deeds therein mentioned, as given for securing the annuity, were witnessed by the four persons whose names were recorded as witnesses; whereas it appeared by the admission of Mrs. *Davenport* herself, on oath, that three of the instruments were only witnessed by two persons.

Garrow and *East* shewed cause against the rule; and objected to the Court's lending their aid to so stale an application, at the

(a) Other objections were started, which, with the parts of the affidavit on which they were founded, and the answers given to them, are not stated in the opinion of the Court was confined to this point.

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 Ex parte
 MACKRETH.

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distance of above nineteen years, and after all the principal parties and witnesses were dead. These considerations have weighed with the Court in many cases, to refuse the inquiry prayed for within a less period; as in *Pool v. Cabanes* (a), and *Ex parte Maxwell* (b): and though no precise limitation of time has been laid down in this respect, yet Lord *Kenyon*, in the latter case, hinted a strong opinion that all objections *dehors* the memorial should be brought forward within six years, the usual period of limitation for personal actions, at least without strong reasons to the contrary. Now here the objection is not apparent upon the face of the memorial; but is brought forward by affidavit. Besides, according to several cases (c), as the party applying might have brought forward the same objection, if any, in the suit in the Exchequer, in 1795, and in the bill in Chancery, in 1801, in both which the validity of this annuity was in question, he is now concluded, the matter having passed *in rem judicatam*. There is also an additional reason for not hearing any objection to the annuity from the present applicant, because he has paid no consideration for the fund out of which the annuity is payable, having purchased the reversion subject to this charge: and therefore he is a mere volunteer without any merits: and as the representatives of Sir *C. F. Ratcliffe* are not before the Court, and make no complaint, it is not competent for any other to do so.

The Court said it was another question, Whether, if this party succeeded in setting aside the annuity, he would not be holden to be a trustee for the representatives of the *Ratcliffe* family, during the life of Lady *R.*; which would hereafter be settled between him and them, though they reprobated the present application very strongly.

2dly, As to the legal objection to the memorial, there are *four* instruments stated therein to have been executed for securing the annuity, which are alleged generally to have been witnessed by four persons; and it appears that *three* of these were attested by two of the witnesses named; but *non constat* that the other, which is not in the possession of Mrs. *Davenport*, was not attested by the other two; and then the memorial, which must be taken *reddendo singula singulis*, will be accurate. The allega-

(a) 8 Term Rep. 528.

(b) *Ante*, 35.

(c) *Withers v. Woolley*, 7 Term Rep. 510. *Greathead v. Bromley*, ib. 455; and *Schuman v. Weatherhead*, *ante*, 1 vol. 557.

tion is not that *each* of the instruments was attested by the four witnesses, or as in *Hart v. Lovelace (a)*, that *all* were so attested.

Erskine, Gibbs, and Dampier, contra, relied on the last-mentioned case as decisive of the objection taken; and said that the word *all* was as fully understood in the allegation, that the four instruments by name were witnessed by the four persons, as if it had been expressed. They admitted that, at this distance of time, the Court would probably not have entered into any objection to the merits of the annuity, which required to be made out by affidavits, and which those who are now dead might have explained; but the fact on which the present objection rested, could not be explained away, and was admitted by Mrs. *Davenport* on her oath; therefore, there could not be greater certainty of the fact, if it had appeared on the face of the memorial itself.

LORD ELLENBOROUGH, C. J. I feel as much reluctance as a Judge ought to do, in giving way to the objection which has been made; but the Act of Parliament is imperative, and whilst it remains on the statute-book, we must give it effect. Under the circumstances of this case, I would look at nothing *aliunde* the memorial which was to be established by the evidence of the party applying; but the objection to not stating the witnesses to the several instruments, *distributive* is made out by that sort of evidence which we ought not to resist, though it be an extrinsic fact. But for Mrs. *Davenport's* answer in Chancery, I should have been inclined to consider that the deeds had been afterwards re-executed by all the witnesses, in conformity with the description in the memorial; but we must, I fear, receive her answer as conclusive against that supposition, since she might have so stated it if the fact were so.

LAWRENCE, J. The Act of Parliament has not prescribed any limitation of time within which applications of this sort must be made; but the Court have said, that they will not entertain such applications after the death of the witnesses to the transaction, who could ascertain the truth of the case; but this objection does not depend upon any testimony which could only have been given by persons who are dead; for the memorial itself states, That the instruments for securing the annuity were witnessed by four persons; and Mrs. *Davenport* shows by her answer, that three of them at least were only attested by the

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1802. If she had fallen into any mistake in that respect, it might easily have been corrected by the production of the deeds themselves. The reason, therefore, of the limitation which the Court have adopted in regulating their discretion, does not apply to this case.

Ex parte
MACKRETH.

LE BLANC, J. I concur in the grounds stated for making the rule absolute, while I also join in reprobating the application. I am not aware of any decision where the Court have bound the party by lapse of time, unless where an answer might have been given to it at a former period, the opportunity of doing which was lost by the delay. That could not have happened in this case. With respect to the ground of objection, the same point was under consideration; and the opinion of the Court expressed on it in *Hurt v. Lovelace*, although that case was somewhat different from this.

Rule absolute for setting aside the warrant of attorney.

[569] *The Court expressed a wish that, in future, the grounds of application, in cases of this description, should be stated in the rule; and afterwards they made the following*

RULE OF COURT.

Trinity Term, 42 Geo. III. 1802.

IT IS ORDERED, That in future, where a rule to shew cause is obtained in this Court, for the purpose of setting aside an annuity or annuities, the several objections thereto, intended to be insisted upon by the counsel at the time of making such rule absolute, shall be stated in the said rule *nisi*.

Monday,
July 5th.

BARNARD *against* GOSTLING and Another.

The stat. 37
G. S. c. 90. s.
26. requiring
a proctor to
take out a cer-
tificate for

IN debt for certain penalties, the third count charged that the defendants not regarding the statutes in such case made, &c. on, &c. at, &c. did *in their own names as proctors* of the Prerogative

practising, under a certain penalty, gives no action to a common informer for the recovery of it; the 6th sect. of that Act incorporating the power of suing, &c. given by former statutes only referring to penalties in respect of duties created by prior sections of that Act. It seems that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted.

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gative Court, &c. and for, and in expectation of gain, fee, and reward in the said Court, &c. extract the probate of a certain will and codicil of one *J. K.* deceased, without having obtained and entered any such certificate or certificates, as in and by the statutes in such case made is directed, contrary to the form of the statutes, &c. whereby, and by force of the statutes, &c. the defendants then and there forfeited for their said last-mentioned offence 50*l.*, &c. and an action hath accrued for the plaintiff, &c. A verdict was taken for the plaintiff on this, and on the 12th and 15th counts, which were in a similar form, for other acts done by the defendants as proctors.

The cause was tried at *Guildhall*, before *Le Blanc, J.* at the Sittings in *Hilary* Term last, when a verdict was given for the plaintiff on the third, twelfth, and fifteenth counts.

A motion was made on a former day in arrest of judgment, and a rule nisi granted on these objections: 1. That the not having obtained and entered a certificate are two distinct offences under the stat. 25 *Geo. 3. c. 80.* and 37 *Geo. 3. c. 90. s. 27.* and not chargeable as one. 2. That the offence, if entire, is several in its nature, and the defendants cannot be sued jointly for the penalty. 3. That the stat. 37 *Geo. 3. c. 90. s. 30.* creating the penalty, gives no such action as the present to a common informer; but the penalty can only be recovered by information on the part of the crown.

Erskine, Gibbs, and Espinasse, shewed cause against the rule. As to the first objection, it is answered by the words of the Act; the offence charged is not for not *having*, nor for not *entering* the certificate when obtained, but for *acting as proctors* on the occasion specified, without having done those two things required by the statute. To the 2d, the same kind of answer applies; the defendants acted *jointly as proctors*, and therefore, the act of one in that character, was the act of both (*a*), unless one objected, and then it would have been matter of defence to him, and he might have been acquitted by the verdict, though the other were found guilty. *Hardyman v. Whitaker et al.* (*b*), and *Bastard v. Hancock* and others (*c*). So two may be convicted in one penalty, though not severally, for the same act of using a greyhound to kill game (*d*). In *R. v. Clarke* (*e*) *K. 1. 14*

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BARNARD
against
GOSTLING.

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(a) *Partridge v. Naylor*, Cro. Eliz. 480. (b) *Bull. N. Pr.* 183. Note cited as *Hardman v. Whitacre & al.* Vid. post, 573, note. (c) *Cuth. 1. 1.*

(d) *R. v. Bleasdale*, 4 Term Rep. 309.

(e) *Comp.* 113-12.

1802. *Mansfield* said, "Where the offence is in its nature several, and
 BARNARD "every person concerned may be separately *guilty*, there each
 against "offender is separately liable to the penalty." In that case,
 GOSTLING. three persons were convicted under one information, for ob-
 structing a custom-house officer; and each was holden sepa-
 rately liable to the penalty. It is true the statutes creating
 offences with respect to killing of game, have the words *person*
 or *persons*; but the determinations have not gone on that ground.
 3. All the statutes in *pari materiâ* are to be construed together;
 and the stats. 39 & 40 *Geo. 3. c. 72.* and 42 *Geo. 3. c. —.* re-
 cite the stats. 25 *Geo. 3. c. 80.* and 37 *Geo. 3. c. 90.* and suppose
 that the same remedies are given for the recovery of the penalties
 created by each; and certainly an action might be maintained
 by a common informer for penalties under the 25 *Geo. 3. c. 80.*

Garrow and *Dampier* in support of the rule. 1. The same
 person may be guilty of an offence, both for acting as a proctor,
 without having *obtained* a certificate, and also for so acting
 without having *entered* it. One of these defendants may not
 have taken out, and the other may not have entered his certifi-
 cate: but here the plaintiff has joined the two offences which
 are separate. If this action were brought against one only, the
 informer could not entitle himself to recover, merely on proof of
 the party having *acted* as a proctor, without having done only
 one or the other of those things. The allegation also is, that
 the defendants did the act without having obtained and entered
 any such certificate *or* certificates; which leaves it uncertain for
 what offence, or whether against one or both the defendants, the
 plaintiff intends to proceed. 2. The action is in its nature
 several, and cannot be maintained against the two defendants
 jointly. It is not like the cases on the game laws, where two
 may concur in the same act: for here the omission to obtain his
 certificate by one cannot be the omission of the other. The
 existence of a partnership could not alter the case; for each
 partner is individually bound to take out his certificate, and the
 taking it out by one alone would not protect the other: neither
 then can the omission to do so be made a joint act. But under
 the game-laws, if one be qualified, that will protect the other's
 acting in aid of him. 3. The stat. 37 *Geo. 3. c. 90.* (upon which
 this action must be sustained) s. 1. & 2, says nothing about the
 certificates, s. 6, which applies the power of suing, &c. for penal-
 ties contained in any prior Acts then in force to that Act, is con-
 fined

fined to such duties as are therein *before* mentioned; and no mention is made of attornies' certificates till the 26th section. The former clause, therefore, does not apply to this latter, so as to give this action to the common informer. Then the general words of reference to the remedies given by prior statutes, contained in the subsequent statutes, which it is not pretended do themselves give the action, cannot supply the omission.

Curia advisare vult.

The Court on this day made the rule absolute, on the ground that the stat. 37 *Geo.* 3. c. 90. gave no such action as the present to the common informer; the section incorporating the power of suing, &c. only applying to the sections antecedent to that, and not to the subsequent section which gave this penalty.

This opinion ruled another case of *Edmonson v. Plaistow*, which came on upon a motion in arrest of judgment.

LAWRENCE, J. (who delivered the judgment) added, that if it were necessary to decide the other point, as to whether the defendants could be charged jointly for the recovery of the penalties, it was governed by the case of *Hardyman v. Whitaker*, of which he had a MS. note; to which he referred (*ay*).

Rule absolute.

(a) *HARDYMAN and WHITAKER et al.*

(*Mich.* 22 *Geo.* 2. *Bull.* N. P. 169, S. C.)

By the stat. 12. *Ann.* c. 11. s. 4. it is enacted, that if any person not qualified by the laws of the realm so to do, shall keep or use any greyhounds, setting-dogs, haves, lurchers, tunnells, or any other engine to kill and destroy the game, and shall be thereof convicted by a justice of the peace, &c. the person or persons so convicted shall forfeit the sum of 5*l.*; one half to the informer, and the other half to the poor of the parish, to be levied by distress and sale, &c. And by the stat. of 3 *Geo.* 1. c. 19. it is enacted, that wherever any person shall for any offence to be hereafter committed against any law now in being for better preservation of the game, be liable to pay any pecuniary penalty upon conviction before any justice of peace, it shall be lawful for any other person whatsoever, either to proceed to recover the said penalty by indictment and conviction before a justice of peace, or to sue for the same by action of debt or on the case, bill, plaint, or information, in any of His Majesty's Courts of record, wherein the plaintiff, if he recover, shall have costs and expenses provided that all suits and actions to be brought by force of this Act, shall be brought before the end of the next Term after the offences committed; but to per-
to be doubly prosecuted for the same offence.

By virtue of these statutes, a joint action of debt was brought against the defendants, *Whitaker* and eight others, to recover one penalty of 5*l.* as forfeited by the said stat. 3 *Ann.* The memorandum on the record *per* 204

Tolney

1802.

BARNARD
against
GOSLING.

[573]

1802. Trinity Term; and the declaration charging that before the exhibiting the bill, viz. on 27th *January*, the defendants keep a lurcher to kill and destroy the game.

HARDYMAN
against
WHITAKER. The defendants pleaded *nil debet*. The Jury found as to six of the defendants, that they do owe to the plaintiff 5*l.*; and as to the other three, that they owed nothing. Upon this there was a motion in arrest of judgment, and three objections made.

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1. That it appears by the memorandum of the record that this suit was commenced in Trinity Term: and the declaration states the offence to have been committed on the 27th of *January* preceding; so that the action appears upon the record itself to have been commenced after the time limited by the Act of Parliament.

2. That this being an action of debt, is a joint action against all the defendants; and the Jury having discharged three of them, their verdict has destroyed the plaintiff's action.

3. That a joint action as this is, cannot for this matter be maintained against several. 2 *Roll. Abr.* 81, pl. 6. *Brooke's case*: If four persons are indicted that they, *et eorum uterque*, used the trade of a plumber *contra stat. 5 Eliz.*, it is not good: for that the user of one cannot be the user of another. *S. P. East.* 11 *Geo.* 1. The *King v. Weston*, indictment against two, charging them jointly for exercising a trade, is bad.

But the Court, after argument and consideration, over-ruled all the objections.

As to the 1st objection: though it do not appear that the bill was filed before of Trinity Term, yet *non constat* but there was a prior commencement of the action by suing out a *latitat*; which is said to be the truth of the case; and the suing out a *latitat* is a sufficient commencement of the suit to save the limitation of time, in an action for a penalty forfeited by the statute: as was resolved by three Judges in the case of *Culliford v. Blandford*, *Carth.* 252.; and therefore this is not to be compared to the cases where the exhibiting the bill appears to be the commencement of the action, and the cause of action arises subsequent to the memorandum.

As to the second objection, this action is not to be considered as founded on a contract, but on a tort, which is joint and several: and for this the case of *Bastard v. Hancock*, *Carth.* 361, is in point: where in an action of debt on the statute against several defendants for not setting out tithes, the Jury found for the plaintiff against one defendant only; and as to the others, *nil debent*: and this very objection taken in arrest of judgment, but over-ruled; for that the action being founded on a tort, and not on a contract, not *culpabilis* would have been a good plea; and therefore one of the defendants may be found guilty and the others acquitted, as in other actions upon torts.

As to the third objection, there is no doubt but that the law allows the charging several persons as joint offenders: and in this case the statute itself has considered several as capable of being joint offenders; for it says that if any person or persons shall keep lurchers and be thereof convicted, the person or persons so convicted shall forfeit 5*l.* So that it gives one penalty of 5*l.* to be paid by the person or persons who act against the statute. The statute

tute has therefore made it a joint offence in all persons concerned, and has made them all subject but to one forfeiture, and they are consequently within the rule of the common law punishable jointly. And therefore the case in *Roll. Abr.* and the case of *The King v. Weston*, will not govern the present; for the penalty in the statute 5 *Eliz.* is laid upon every person offending; and therefore in the case of *The Queen v. Atkinson*, 2 *Ld. Raym.* 1243, and *Salk.* 382, upon an objection of this kind taken to an indictment against two persons for extorting money as receivers of the land tax *colore officii*, and supported by the above case in *Roll. Abr.*, it was resolved to be an offence which two might join in, or it might be several, as in trespass: but otherwise of exercising a trade; for per *Holt*, the forfeitures are distinct, and that which makes the crime is several, viz. the not having been apprentice. But that is not the case at present where the statute itself has made the offence joint: and the distinction is where the offences are made joint and where not; as in the case of *Partridge v. Naylor*, *Moor*, 453, in an action of debt on the stat. 1 and 2 *Phil.* and *Mar.* for impounding a distress in divers pounds brought against three, who being found guilty, damages of 40s. a-piece were assessed and trebled by the Court to 6l. a-piece, and 5l. a-piece forfeiture by the statute: and though the words of that statute are, that every person offending shall forfeit to the party grieved 5l. and treble damages; yet upon error, the Court, after several arguments, reversed the first judgment; for that the words, "every person offending," are not to be referred to the severality of the persons, but of the offences: and as they all three offended in one joint fact, there ought to have been but one 5l. forfeited; and in the case of *The Queen v. King*, *Salk.* 182, where two were convicted of deer-stealing, and judgment that each should forfeit 30l.: and because this penalty is not in nature of a satisfaction to the party grieved but a punishment on the offender, and crimes are several though debts be joint, and therefore distinguished it from the case of *Partridge v. Naylor*. For which reason the Court gave

1802.

HARDYMAN
against
WHITAKER.

Judgment for the Plaintiff.

STEVENSON against LAMBARD.

Tuesday,
July 6th.

THE plaintiff declared in covenant against the defendant as assignee of one *Charles Dixon*, upon an indenture made on the 1st of *May* 1798, whereby the plaintiff for the considerations therein mentioned, demised to *Dixon* and his assigns two messuages and a warehouse therein described, to hold from the 25th of *March* then last past, for the term of thirty-one years, at the yearly rent of 105*l.* by equal quarterly payments, viz. &c. The declaration then set forth the covenant by *Dixon* for him-

An action of covenant brought against the assignee of a lessor of an estate for a part of the rent, is a special case. The action is brought on a real contract.

in respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or replevin. Aliter in covenant against the lessor landlord, who is liable on his personal contract.

sett

1802.
 STEVENSON
 against
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self and his assigns, &c. to pay to the plaintiff the said yearly rent at the times and in the manner abovementioned; and that *Dixon* entered and was possessed; &c. and that afterwards, on the 28th of *March* 1801, all the right, title, &c. and term of years then to come and unexpired in the said demised premises, vested by assignment in the defendant, who by virtue thereof entered, and became and was possessed for the residue of the said demised term then unexpired; and then assigned a breach for non-payment of one year's rent, which became due on the 20th *September* 1801, since the said assignment. Pleas, 1. *Non est factum*; 2. That all the interest and title, &c. of *Dixon* did not vest by assignment in the defendant; 3. No rent in arrear: on all which issues were joined. The defendant then pleaded, 4thly, That as to so much of the said supposed breach of covenant above assigned, as relates to the non-payment of the sum of 52*l.* 10*s.*, parcel of the said 105*l.* of the rent supposed to become due on the 29th *September* 1801, for one half year of the said term, *actio non*, &c. because one *John Walker*, before and at the time of making the said indenture, &c. and from thence until, upon, and after the said 29th *September* 1801, was seised in fee of one undivided moiety of the said demised premises, and brought an ejectment in *K. B.* in *Hil.* 41 *Geo.* 3. against the present plaintiff for the recovery of the same; in which ejectment the demise was laid before any of the said 52*l.* 10*s.* parcel of the rent aforesaid became due, &c. and such proceedings were afterwards had, &c.; that *Walker* in *Easter Term*, 41 *Geo.* 3, recovered judgment against the present plaintiff in the said ejectment, for the said undivided moiety of the demised premises, and afterwards, viz. on 21st of *April* 1801, sued out a writ of *habere facias possessionem* upon the said judgment, under which the sheriff, before any part of the said 52*l.* 10*s.* parcel, &c. became due, delivered possession, &c. to *Walker*, who thereupon entered into the said undivided moiety, &c. and ejected the defendant, &c. There was a similar plea, stating generally the paramount title of *Walker*, and his ejection of the defendant from one moiety of the demised premises. To these there was a general demurrer and joinder.

Marryat, in support of the demurrer, said, that as it was clear that an action of *debt* would lie in this case, and as the authorities established general (though he admitted without distinguishing between *debt* and *covenant*) that in case of an eviction

tion of the tenant from part of the lands leased, the rent was apportionable, it lay on the defendant to point out the distinction between debt and covenant in this case. And he cited *Bro. Abr. tit. Apportionment, pl. 24.* and *1 Rol. Abr. 235. pl. 16. Gilb. on Rents, 147. Clun's case (a), and Midgley v. Lovelace (b);* and contended that a breach might be assigned in covenant merely on the *reddendum*. That supposing a contract not to be apportionable, yet there was no inconsistency in the plaintiff in this case; for he did not declare in covenant as for a moiety of the rent reserved, but for the whole; and it was not competent for the defendant to set up as a bar to the whole demand that which was only an answer to part of it.

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Lawes, contrà, relied on the want of any precedent of a recovery in covenant under similar circumstances, as a strong argument for shewing that the action was not maintainable. There is a material distinction between debt and covenant in this respect: for in the former the law raises a debt in respect of the privity of estate, and therefore the amount is necessarily apportionable in respect of the *quantum* of estate. But the latter is a personal contract, and cannot be apportioned. He referred to *3 Vin. Abr. 5*, as collecting all the cases. At any rate the plea is an answer to the breach assigned, which is for the non-payment of the *whole* rent, now admitted not to be due. In *Richards v. Comeford (c)* where the defendant avowed for two years and a half rent in arrear on a lease, reserving the rent yearly, the Court of *B. R.* on error brought, held, that though before judgment the avowant might have abated his avowry as to that part to which he had no right, yet on the whole record as it then stood, judgment must be reversed, because the avowry was for the whole rent, and he could not support his title to the whole. Here there can be no apportionment on the demurrer (*Hill. 43 Ezz. B. R. 17 Vin. tit. Apportionment, E*) for apportionment is the act of a Jury and therefore as the Court must pronounce judgment for the plaintiff, if at all, to the extent of the breach assigned, and it appears that so much is not due, there must be judgment for the defendant.

Marryat, in reply, observed, that no case had been stated to shew the distinction contended for. That in the case of *Richards*

(a) 10 Co. 123. a.

(b) *Carth. 239.*(c) *Com. Rep. 4. 1
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v. Comeford there was no eviction of the tenant from any part of the land, but an attempt to apportion the rent as to part of the time, before it was due, which all the books agree (*a*) cannot be done. That as to the breach being assigned for the non-payment of the whole rent, instead of a proportion of it; if the plaintiff might have recovered on this declaration for what was due, provided the defendant had pleaded his defence *pro tanto*, according to the truth, it could not vary the plaintiff's right, that the defendant had pleaded the same defence in bar to the whole right of action, which he ought not to have done.

Curia advisare vult.

LORD ELLENBOROUGH, C. J. now delivered the judgment of the Court:

This is an action of covenant by the lessor against the assignee of the lessee for non-payment of a year's rent. Plea as to rent for half a year claimed, eviction during that time of a moiety of the premises by title paramount. To this there is a demurrer: and the question is, Whether the rent be apportionable in this action of covenant by the lessor against the assignee of the lessee? It clearly is so upon an action of debt, or upon an avowry in replevin, by all the authorities: and the only question is, Whether it be so in covenant? In covenant, as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable. *Bro. Contract. pl. 16. Moor, 116, Finch's Law, lib. 2. c. 18.* But an action of covenant against an assignee differs essentially from a mere covenant personal: it is in such case properly a real contract in respect of the land; it is local in its nature and not transitory. In *Barker v. Damer, Carth. 183*, it is said to be "adjudged in several of our books (*b*) that an action of debt for rent against an assignee of a term is local, and will lie nowhere but in that county where the lands are. And the same reason holds in covenant against the assignee; for this action as well as that of debt is maintainable only upon the privity of estate, and the defendant is merely charged thereby, because it is a covenant which runs with the land; for if it had been a collateral covenant, the assignee would not have been bound by it; and that

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(*a*) Vi 10. Co. 123 a.

(*b*) Vide all the cases collected by Serjt. Williams, in a note to the case of *Thursby v. Plant*, 1 Saund. 241, b.

"proves that the action is local only with respect to the land." The objection as to the locality of this species of action of covenant, as against an assignee, was only gotten over in the case of the Mayor of *London* against *Cole*, 7 *Term Rep.* 587, by the help of the stat. 16 and 17 *Car.* 2. c. 8. as being a mistrial cured by verdict. So covenant will lie against the assignee of *part* of an estate for not repairing his part; "for it is dividable, and follows the land," with which the defendant, as assignee, is chargeable by the common law, or by the stat. 32 *H.* 8. c. 37. *Congham v. King*, *Cro. Car.* 222. Upon the whole, therefore, we think that the condition of this assignee is in point of law different from that of a lessee chargeable on the privity of contract; and being chargeable on the privity of estate, and in respect of the land, his rent is upon principle apportionable as the rent of a lessee is, or as his rent would be in an action of debt or replevin. Judgment for the plaintiff; with leave to the defendant to amend his plea, and to plead it only to one moiety of the rent.

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JOHNSON against SHEDDON.

Wednesday,
July 7th.

THIS case was very fully argued in *Easter Term*, 41 *Geo.* 3. by *Garrow*, *Parke*, and *Laures*, against the rule for a new trial, and by *The Attorney General* and *Gibbs*, in support of it. It is unnecessary to detail the arguments, as the substance of them was so distinctly stated in the judgment of the Court, which was delayed till now, in consequence of a difference of opinion on the Bench while Lord *Kenyon* presided in the Court. LAWRENCE, J. (in the absence of *Grose*, J.) now delivered the judgment of the Court:

This is a motion for a new trial of an action brought against the defendant, an underwriter, on goods on board a ship called the *Carolina*, from *Sicily* to *Hamburg*, to recover a partial loss sustained by the plaintiff, by reason of the sea water having damaged a cargo of brimstone and shunack; and upon a calculation by Mr. *Oliphant*, to whom it was referred by the parties to ascertain the loss sustained, it has been settled after the rate of 76*l.* 7*s.* 4*d.* per cent. And the ground on which the new trial

The rule by which to calculate a partial loss on goods by reason of sea damage, is the difference between the respective proceeds of the same goods, when sold, &c. when damaged, &c. and the net proceeds, it being settled that no underwriter is to be liable on a partial loss, or partial damage, or charges at the option of the party insured, but that the loss sustained shall be

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has been moved for is, that Mr. *Oliphant* has proceeded in his calculation upon a mistake, inasmuch as in estimating the loss * he has taken for his foundation the difference between the *net* produce of what the goods have produced, and what they would have produced if sound; instead of the difference between their respective *gross* produces. Upon the fullest consideration that we have been able to give this question (which has been depending a great while, and which was argued before Lord *Ellenborough* came upon the bench, and who, if the case were to be argued again, would give no opinion, having been concerned in the cause when at the bar) my brothers *Grose* and *Le Blanc* agree with me in thinking there should be a new trial, and that the calculation is wrong. Some points are agreed on both sides; viz. that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, 2 *Burr.* 1170, that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which the underwriter is responsible, is that which arises from the deterioration of the commodity by sea damage: and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis v. Rucker*, Lord *Mansfield* says, "Where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantum of the damage: but if you can fix whether it be a third, a fourth, or a fifth worse, the damage is fixed to a mathematical certainty;" and this he says is to be done "by the price at the port of delivery." From hence it follows, that whatever price at the port of delivery ascertains whether a commodity be a third, fourth, or a fifth the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all charges have been paid by the person of whom he purchases; or, in other words, by the difference of the gross produce, and not by the difference of the net produce. When a commodity is offered to sale by one who has nothing further to pay than the sum the seller is to receive, it is the quality of the goods, which in forming a fair and rational judgment can alone influence him in determining him what he shall pay: he has nothing to do with what it may have cost the seller; and the goodness of the thing is the criterion which must regulate the price: for being liable to no other charges,

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charges,

charges, he has only to consider its intrinsic value; and therefore if a sound commodity will go as far again as a damaged commodity, by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound than he will for the damaged; and so in proportion. To say that this is not the rule, will be to assert, what I conceive it will be difficult to prove, that the market price of things is not proportioned to their respective values: and if it be, it is a means of ascertaining whether a commodity be a third, a fourth, or a fifth the worse by any risk it may have met with; and the damage will be thereby ascertained in the degree pointed out in *Lewis v. Rucker*; and the underwriter who shall pay by this rule, will pay such proportion or aliquot part of the value in the policy, as corresponds with the diminution in value occasioned by the damage. Lord *Mansfield*, in laying down the rule, speaks of the *price* of the thing at the port of delivering as the means of ascertaining the damage; by which he must mean the whole sum, which is to be paid for the thing. For the net proceeds are not the price, but so much of the price as remains after the deduction of certain charges. Lord *Mansfield* cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums, for such payment is in effect but a *part* of the price; it is not an equivalent for the thing sold; for if the purchaser were not liable to the duties and charges, he would give as much more as the amount of those charges comes to. The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum and the charges constitute the cost. It is not necessary that the whole price should be paid to one person. To taking the net proceeds to calculate by, there are several objections; one is, that by taking the net proceeds as the basis of the calculation instead of the gross proceeds, it will happen, where equal charges are to be paid on the sound and damaged commodity, that the underwriter will be affected by the fluctuation of the market, which he ought not to be. This is obvious from considering, that if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between the remainders: e. g. Suppose sound goods, including all charges, to sell for 100%, the damaged for 300%: let the charges on each be 100%: the difference

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- [585] Another consequence of taking the net produce will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea damage; but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged: one being subject to duties and charges, and the other to none: the degree of deterioration being supposed the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated half; that the demand for the commodity and the state of the market is the same; and that the goods, if sound, would sell for 1000*l.* but being damaged, for 500*l.* and the charges to be 2000*l.* On those goods where no charges are to be paid the insurer will have to pay fifty per cent. The goods on which charges are to be paid, being equally good with the other, will sell in the market for the same sum, and when the charges are deducted, if sound, will produce 800*l.*; but being damaged, after the same deduction, will produce only 300*l.*; and according to that calculation, if the underwriter were to pay, he would pay five-eighths instead of four-eighths, or one half: not because the one cargo has suffered more than the other by the sea, for the supposition is, that the sea damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges. Suppose the same goods sold before the mast; a purchaser for those not liable to the duties, would give exactly what he would give if there had been duties which the seller had paid; for as he has nothing further to pay to him, it is just the same whether the seller had no charges to pay, or whether there were charges which he has paid; the commodity in the one case and in the other comes to the buyer's hands in the same state, But on these
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300—100—200
150—100—50
—
difference 150
- 1000--200--800
500--200--300
—
difference 500

these goods, if liable to the further charges, he could give, if sound, but 800*l.* as the duties he would have to pay would make the whole cost 1000*l.*; and if damaged, and liable to the same charges, he could give but 300*l.*: for as he would be liable to pay 200*l.* in charges, if he were to give above 300*l.* the whole amount of what he would ultimately pay for the damaged goods would exceed their value, which by the supposition is but 500*l.*: he would, therefore in this case, give for the damaged less than in proportion to its degree of deterioration; for in giving 300*l.* he would only give three-eighths instead of four-eighths, or a half; not because the damaged commodity is not half so good as the sound, but because on such damaged commodity he must pay as large charges as on the sound; and as this loss to the assured arises from a purchaser not being able to pay in proportion to the intrinsic quality of the commodity, it shews that a sale before the mast, when equal duties are to be paid, does not correspond with the deterioration of the commodity, nor ascertain whether it be a third, fourth, fifth, or in what degree worse than the sound; consequently, that the difference of the net produce cannot be the rule to calculate by, where the charges are not proportioned to the respective values of the sound and damaged commodity. Another objection is, that if the net produce be taken, it may happen that you can have no *data* to calculate by; which will be the case if the gross produce of the sound commodity should only pay the charges, and leave no net proceeds; for then there can be no difference between the net proceeds of the sound and damaged; in proportion to which it is contended that the underwriter is to pay. Upon the whole of this case, it is our opinion that the rule should be absolute for a new trial.

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THE END OF TRINITY TERM.

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1. To an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case, for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that it was made by the defendant *bona fide*, and with a belief of the truth of it; for the foundation of the action is *fraud and deceit* in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of *knowledge secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycraft v. Creasy*, *M.* 42 G. 3. 92
2. A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to amount to a farthing; at least the smallness of the damage found is no ground for a nonsuit. *Pindar v. Wadsworth*, *H.* 42 G. 3. 154

3. In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd v. Johnson*, *H.* 42 G. 3. 211
4. In an action on the case in tort for a breach of a warranty of goods, the *scout* need not be charged, nor, if charged, need it be proved. *Williamson v. Allison*, *T.* 42 G. 3. 146
5. It is not necessary to give a local description to the nuisance in an action on the case for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to be laid in the declaration is as a venue or as local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *The Mersy and Ince's Navigation v. Douglas*, *T.* 42 G. 3. 147

Admiralty.

1. An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a King's ship is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship, and notice is only taken of the appointment in the book of regulations for the

navy. And such second captain is entitled to a captain's share of prize under the King's proclamation. *Waterhouse v. King*, T. 42 G. 3. 507

2. The book of regulations for the navy, submitted by the Lords Commissioners of the Admiralty to the King in council in 1730, and approved by his Majesty by an order of council, is only directory to the Lords Commissioners. *ib.*

Affidavit.

1. Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without stating, that such third person was under the controul or influence of the defendant. *R. v. Pinkerton, E.* 42 G. 3. 357

Affidavit to hold to Bail.

1. In an affidavit to hold to bail for 20*l.* and upwards, it is sufficient to negative a tender of *the said sum* in bank-notes: that having reference to the specific sum sworn to, which was such as might be so tendered. *Maylin v. Townshend, M.* 42 G. 3. 1
2. Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail to negative a tender of the debt in bank-notes *to the best of his knowledge and belief*; but such tender must be positively negated. *Elliot v. Duggan, M.* 42 G. 3. 24
3. An affidavit to hold to bail for a certain sum for the breach of an agreement must shew that the sum is stipulated damages, and not merely a penalty. Stating that the defendant bound himself in a certain sum to perform a certain agreement, and that he had neglected and refused to perform his part, is not sufficient. *Wildev v. Thornton, T.* 42 G. 3. 409
4. No counter affidavit can be received in *B.* in order to contradict or do away the effect of an affidavit to hold to bail on the merits. And though such counter affi-

davit might be received to shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country: at least where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. *Inlay v. Ellefsen, T.* 42 G. 3. 453

5. If a defendant be holden to bail under a Judge's order, upon an affidavit disclosing circumstances which shew that the plaintiff has been *damni*fied to such an amount, it is sufficient; though it improperly state that the defendant was *indebted* to that amount, and disclose the special circumstances. *ib.*

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See Action on the Case.

Assumpsit.

Pleading.

Annuity.

1. An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And semble that an annuity paid without objection, for more than six years, shall be protected by analogy to the statute of limitations against any such objection debors the memorial, without strong reasons to the contrary. *Ex parte Maxwell, M.* 42 G. 3. 85
2. An annuity secured on lands in fee of equal annual value, need not be registered under the stat. 17 G. 3, c. 26, s. 8, though the annuity were also secured upon leasehold property. *Ex parte Mitchell, H.* 42 G. 3. 137
3. A memorial of an annuity, stating the whole consideration to have been paid in money, is good; though part of it were paid by means of a banker's check, the value of which had been actually received by the grantor some time before the execution of the deeds. *ib.*
4. Where the memorial of an annuity registered

tered under the stat. 7 G. 3, c. 26, stated that "the bond, warrant of attorney, indenture and deed poll, given to secure the annuity, were witnessed by four persons," that must be taken to mean that each of them were so witnessed; and therefore if it appear by the answer on oath of the assignee of the grantee, that *three* of the instruments were attested by *two* persons only, the Court on application, though at the distance of near twenty years, and after the principal parties and witnesses to the transaction are dead, will set aside the warrant of attorney; the merits of such objection not depending on testimony lost by the delay. *Ex parte Mackreth*, T. 42 G. 3. 563

5. Where a rule nisi is obtained in *B. R.* for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute, must be stated in the said rule nisi. *Regula generalis*, T. 42 G. 3. 569

Appeal.

See Overseers of the Poor, No. 2.

1. By s. 19 of stat. 13 G. 3, c. 78, where an order of justices has been made for stopping up a road, an *appeal* is given to the party grieved by any "such order or proceedings, &c. at the *next quarter sessions after such order made or proceeding had*," &c. held that at all events an appeal to the Sessions next after the *actual obstruction* of the road was too late; the party having had sufficient notice of the order in time to have appealed to a preceding Sessions, before which time the surveyors of the highways had begun to stop up the road. *R. v. The Justices of Pembroke-shire*, H. 42 G. 3. 213

Assumpsit.

1. A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as *B.*; though he were there wrongfully dismissed by the defendant, the captain; but his remedy is

either for the breach of the special contract, or for such tortious act of the captain's, whereby he was prevented from earning his wages. *Hulle v. Hughtman*, H. 42 G. 3. 145

2. Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased) such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*, E. 42 G. 3. 314
3. The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant; held, that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. *Casting v. Ashert*, E. 42 G. 3. 125
4. Money paid by one with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law. *Bibb v. Lord*, T. 42 G. 3. 404
5. *Qu.* were such payment made under an uncertainty of the facts? *Chaplin v. Panton*, M. 30 G. 3, cited. 41
6. The law will not raise an implied promise in the parish where a pauper is settled.

tled, to reimburse the money laid out by another parish, in which he happened to be, in providing necessary medical assistance for him. *Atkins v. Banwell*, T. 42 G. 3. 505

Attorney.

One who executes a deed for another, under a power of attorney, must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names; as if opposite the seal be written "for J. B." (the principal) "M. W." (the attorney) "*L. S. Wilkes and another v. Back*, H. 42 G. 3. 142

Attorney, Warrant of, to confess judgment.

See Practice, No. 1, 2.

Bail.

1. If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity. *R. v. the Sheriff of Surrey*, H. 42 G. 3.; and *Foxall v. Bowerman*, *ib.* 181
2. An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon. *Davison v. Frost*, E. 42 G. 3. 305
3. Bail in error are not required by stat. 3 J. 1, c. 8, on error brought on a judgment by default in debt on account for a promissory note, any more than on counts for goods sold and delivered, and on an account stated: though if there were one count, on which judgment was entered up, for which bail in error were not required, it seems sufficient to excuse the plaintiff in error. *Trier v. Bridgman*, E. 42 G. 3. 359
4. A writ of error, though not returned, is of itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognizance of bail prosecuted after a return by the she-

riff of *non est inventus* made pending such writ of error. *Sampson v. Brown*, T. 42 G. 3. 439

Bankrupt.

1. A trader orders bags of wool of defendants (merchants) in *December*, which are delivered on the 19th of *February* following; and by the course of dealing the trader has the option of returning the wool for which he has no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice; he being then in embarrassed circumstances, and intending not to take them into the account of his stock if in the event he found himself unable to pursue his business. Afterwards, on the fourth and fifth of *March*, being then avowedly insolvent, he returns the bags with a letter to the merchants, declaring his situation, and hoping they will have no objection to take back the wool, and requesting the favour of a line of approbation thereof; which letter is received and the approbation given after an act of bankruptcy committed on the same day the letter was sent. Held, that by the trader keeping possession of the goods so long, his option, (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them, but that the trader's assignees are entitled to the property. *Neate v. Ball*, M. 42 G. 3. 117
2. If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the Registry Acts of the 26 G. 3, c. 60, and 34 G. 3, c. 68, s. 16, though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass; but

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but the assignees of the bankrupt may recover the possession of such ship in trover. *Moss v. Charnock*, *E. 42 G. 3.* 399

Baron and Feme.

See Will, No. 1, 2.

- A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees or their executors, &c. is valid in law. *Rodney v. Chambers*, *E. 42 G. 3.* 283

Bill of Exchange, &c.

See Witness, No. 1.

Bridge.

1. The county or riding is liable to the repair of a bridge built by trustees under a Turnpike Act; there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. *R. v. The Inhabitants of the West Riding of Yorkshire*, *E. 42 G. 3.* 342
2. If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: aliter if built by him for his own benefit, and so continued without public utility, though used by the public, *ib.* 342
3. A bridge built in a public way without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *ib.* 342
4. Where to an indictment against a Riding for not repairing a public carriage bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge; evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, will not support the plea. *Mich. 28 G. 3. ib.* 353
5. Where townships have so enlarged a bridge which they were before bound to

repair as a foot bridge, they shall still be liable *pro rata*, *ib.* 353

6. Where an individual builds a bridge, which he dedicates to the public, by whom it is used, the county are bound to repair it. *ib.* 353
7. The county is liable to repair a bridge, built in the highway and used by the public above forty years, though originally erected for the convenience of an individual. *R. v. The Inhabitants of the county of Glamorgan*, *cor. Lord Kenyon, C. J. at Hereford, in 1788.* 356

Broker.

See Lien, No. 2.

Candles.

See Excise.

Certiorari.

1. If an order of removal be confirmed at the Sessions, and both orders be removed into *B. R.* by certiorari on a case reserved, and this Court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order, this Court will quash both orders, without remitting back to the Sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1, c. 7, s. 9; and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell*, *H. 42 G. 3.* 222

Collateral Promise.

See Assumpsit, No. 3.

Commoner.

1. A commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a *perthong*, at least the smallness of the damage found

found is no ground for a nonsuit. *Pindar v. Wadsworth*, H. 42 G. 3. 154

Consignor and Consignee.

See *Lien*.

Contract.

See *Pleading*, No. 1, 2.

Conveyance.

See *Insolvent Debtor*, No. 2.

Conviction.

1. If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed) the latter may be rejected as surplusage. *R. v. Picton*, H. 42 G. 3. 195
2. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath. *ib.*

Corporation.

See *Quo Warranto*,—*Information in nature of*.

1. Where a power of creating freemen is shewn to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect; even supposing such a power could be transferred by a by-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of *James I.* and *Charles II.* had been since those charters, &c. continually exercised by the select body in question: and although such charters contained a confirmation of all former privileges, &c. under whatever names of incorporation theretofore enjoyed. *Rex v. Holland*, M. 42 G. 3. 70

Costs.

1. The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions: but each party applying pays his own expence, unless it be otherwise expressed in the rule. *Stephens v. Crichton*, E. 42 G. 3. 259
2. Where the plaintiffs sued as executors in covenant against the lessor of their testator, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator; held, that they were not liable to pay the costs of a judgment as in case of a nonsuit; inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. *Cooke v. Lucas*, E. 42 G. 3. 395

Court Leet.

See *Custom or Jurors*, No. 1.
Quo Warranto, No. 3.

Covenant.

1. A covenant by a husband to pay to trustees a certain annual sum, by way of separate maintenance, for his wife, in case of their future separation with the consent of such trustees or their executors, &c. is valid in law. *Rodney v. Chambers*, E. 42 G. 3. 283
2. An action of covenant lies against the assignee of a lessee of an estate for a part of the rent: as in such case the action is brought on a real contract in respect of the land, and not on a personal contract: and in case of eviction the rent may be apportioned, as in debt or replevin. *Alister* in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard*, T. 42 G. 3. 575

Cross Remainders.

See *Devise*, No. 1, 2.

Custom.

- A custom to swear the jurors at one court leet, to inquire and to return their presentments

sentments at the *next* court, is bad in law. *Davidson v. Moscrop*, *M.* 42 *G.* 3. 56

Deed.

See Insolvent Debtor, No. 2.

1. One who executes a deed for another under a power of attorney, must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names: as if opposite the seal be written "for *J. B.*" (the principal) "*M. W.*" (the attorney) "*L. S.*" *Wills and Another v. Bach*, *H.* 42 *G.* 3. 142
2. Where in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient to let in proof of the hand of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. *Cunliffe v. Sefton*, *H.* 42 *G.* 3. 183
3. If a subscribing witness to a deed be abroad, out of the jurisdiction of the Court, and not amenable to the process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad. *Prince v. Blackburn*, *H.* 42 *G.* 3. 250

Devise.

See Will.

1. Under a limitation (after estates for life to *A.* and *B.*) of "all and every the said premises to all and every the younger children of *B.* begotten or to be begotten; if more than one, equally to be divided amongst them, and to the heirs of their *respective* body and bodies as tenants in common, &c.; and if only one child, then to such only child, and to the heirs of his or her body issuing; and for want of such issue," (a devise of) *the said premises* to *C. N.*, &c. (with several limitations over): and for want of such issue," then the testator divided *the said premises*

between several branches of his family. Held, that cross remainders were to be implied between the younger children of *B.* from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise. *Watson v. Foxon*, *M.* 42 *G.* 3. 36

2. A devise by *A.* (having three sons and seven daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the devisors brother; gives cross remainders to the daughters. Between more than two the presumption is against cross remainders; but this may be controlled by a plain intention to the contrary. *Doe v. Burville*, *E.* 13 *G.* 3, *cited.* 47
3. *A.* gave by will his tenant-right which he held by lease to *A. I.* but not to dispose of or sell it: and if he refused to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money, left the title-deeds with his creditor as a security, and confessed a judgment to secure the money: and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution: and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered; held, that *J. I.* the remainder-man, was entitled to enter, the estate of *A. I.* having determined by such his acts. *Dodd, Ribbetson v. Hewle*, *T.* 42 *G.* 3. 481

Ejectment.

1. A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part; in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired

- expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment: held, the second notice was no waiver of the first. *Doe v. Williams*, *H. 42 G. 3.* 237
2. Where a defendant in ejectment held as to the arable lands from Candlemas, and as to the rest of the farm from May-day, the rent being payable at Michaelmas and Lady-day, and notice to quit was given six months before May-day, but not six months before Candlemas; Lord *Kenyon*, at *Stafford* sum. as. 1788, nonsuited the plaintiff. *Quere*. Whether the notice to quit were given half a year before Lady-day? *Doe d. Ld. Grey de Wilton, v. —*, cited in *Doe v. Calvert.* 384
3. A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 *Eliz. c. 20*, and the lease to the defendant, describing him as doctor in divinity, produced by him at the trial in support of his title, is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 *H. 8. c. 13. s. 3.* *Throgmorton d. Fleming v. Scott, T. 42 G. 3.* 467
- Evidence.*
- See Rector, No. 1.*
1. A settlement, by being rated and paying rates, cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate. *R. v. The Inhabitants of Coppull, M. 42 G. 3.* 25
2. Neither the hearsay of a pauper who is dead, nor his *ex parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. *R. v. the Inhabitants of Ferry Frystone, M. 42 G. 3.* 54
- And *R. v. the Inhabitants of Chadderton, M. 42 G. 3.* 27
3. So an *ex parte* examination of a pauper, touching his settlement, cannot be received in evidence of such settlement, though he be dead. *R. v. the Inhabitants of Abergwilly, M. 42 G. 3.* 63
4. The payment of money into Court upon a count stating a special contract, is an admission of such contract, and narrows the inquiry to the *quantum* of damages sustained by the breach thereof. Therefore, if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5*l.* unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *Yate v. Willan, M. 42 G. 3.* and *Pigott v. Dunn, E. 36 G. 3.* cited *ib.* 128
5. Where, in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses, at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him, held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. *Cunliffe v. Sefton, H. 42 G. 3.* 183
6. If a subscribing witness to a deed be abroad, out of the jurisdiction of the court, and not amenable to its process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad. *Prince v. Blackburn, H. 42 G. 3.* 250
7. Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson v. Hodges, E. 42 G. 3.* 312
8. Where a defendant is brought up to receive

- ceive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him, that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least, not without swearing that such third person was under the controul or influence of the defendant. *R. v. Pinkerton, E. 42 G. 3.* 357
9. Where the stat. 7 & 8 W. 3. c. 30. s. 24, enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made, proof of a printed summons distributed and issued in blank, by order of the commissioners to their agents, and afterwards filled up by one of them, without any special directions from the board, is sufficient, although not signed by any of the commissioners, nor issued in their individual name; such having been the constant usage in that respect since the introduction of the excise. *R. v. Steventon, E. 42 G. 3.* 362
10. In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor if charged, need it be proved. *Williamson v. Allison, T. 42 G. 3.* 446

Excise.

1. The stat. 26 G. 3, c. 77, s. 13, which enacts that no person shall prosecute "any action, bill, plaint, or information, "in any of the King's courts," for the recovery of any excise, penalty, &c. unless prosecuted by the Attorney-General or some revenue officer, is confined to the *superior courts of record*; and therefore an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10. of the same statute) may be prosecuted before the commissioners of excise by one not averred to be such officer. *R. v. Steventon, E. 42 G. 3.* 362
2. And the information, stating in effect that

the candles were home-made candles, seems to be sufficient, without expressly naming them *British* candles; the words of the Act being "British spirits, soap, and candles;" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding, for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy. 362

3. The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condemnation as well as prior payment of the duty before removal; though that seems proper enough. *ib.*
4. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. *ib.*
5. Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1, G. 2, stat. 2, c. 16. *ib.*
6. Neither is it necessary, in reciting such prior information, averred to have been made within three months after the offence committed, according to stat. 1, W. & M. c. 54, s. 13, also to aver that it thereof to the original defendant within a week, as is directed to be given by the same statute. *ib.*
7. Where the stat. 7 & 8 W. 3. c. 30. s. 24, enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made, proof a printed summons distributed and issued in blank, by order of the commissioners to their agents, and afterwards filled up by one of them, without any special directions from the board,

is sufficient, although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the excise. *ib.*

Execution.

1. A defendant cannot be taken in execution *twice* on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on, which he did. *Blackburn v. Stupart, H. 42 G. 3.* 243

Executors.

See Costs, No. 2.

False Representation of Credit.

See Action on the Case, No. 1.

Feme Covert.

See Will, No. 1, 2.

Foreign Courts.

See Prize, No. 1.

In justifying a trespass under the process of a foreign Court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior Courts: but at any rate, a plea which only states that the Court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such Court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said Court, having competent authority in that behalf, to seize the property, is bad, being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the Court, or party to the cause; or of what nature the charge was, or by whom instituted; or what the order of seizure was, whether absolute or *quousque*, &c. *Collett v. Lord Keith, E. 42 G. 3.* 260

Forfeiture.

- A. gave by will his tenant-right, which he held by lease, to *A. I. but not to dispose of or sell it; and if he refused to dwell there, or keep it in his own possession*, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money, left the title-deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution; and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered, held that *J. I.* the remainderman, was entitled to enter, the estate of *A. I.* having determined by such his acts. *Doe d. Ibbetson, v. Hawke, T. 42 G. 3.* 481

Frauds—Statute of.

See Assumpsit, No. 3.

The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: held, that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement, in not providing for the payment of the acceptances, as also upon account for money had and received, &c. *Castling v. Aubert, E. 42 G. 3.* 325

Highway.

1. By s. 19 of stat. 13 G. 3, c. 78, where an order of justices has been made for stopping

ping up a road, an *appeal* is given to "the party grieved by any such order or proceeding, &c. at the next quarter sessions after such order made or proceeding had," &c.; held, that at all events an appeal to the Sessions next after the actual obstruction of the road was too late; the party having had sufficient notice of the order in time to have appealed to a preceding Sessions, before which time the surveyors of the highway had begun to stop up the road. *R. v. The Justices of Pembrokeshire*, II. 42 G. 3.

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2. Under the stat. 13 G. 3, c. 84, s. 33, *B. R.* may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed thither by *certiorari*. *R. v. The Inhabitants of Upper Papworth*, T. 42 G. 3.

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Husband and Wife.

See Baron and Feme.

Indictment.

1. To solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting: and such offence is indictable at the sessions, having a tendency to a breach of the peace. *Rex v. Higgins*, M. 42 G. 3.
2. In an indictment on the stat. 30 G. 2, c. 24, for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so; by means of which said false pretences he obtained the money; afterwards negating such pretences to be true: though it be not in terms alleged, that he *falsely* pretended, &c.; and it seems it would have been sufficient to allege, that he obtained the money by such and such pretences, averring such pretences to be false. *Rex v. Airey*, M. 42 G. 3.
3. The Court will not quash a defective indictment on the motion of the prosecutor

after plea, pleaded before another good indictment be found. *R. v. Dr. Wynn*, II. 42 G. 3.

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Insolvent Debtor.

1. One who was arrested at the suit of the plaintiff, and liberated on bail prior to 1st March, 1801, and was afterwards committed in execution, at the suit of the same plaintiff, before the passing of the Insolvent Act of the 41 G. 3, c. 70, is entitled to be discharged by the 6th section of that Act, on the conditions thereby imposed. And this, where he was so taken in execution upon a judgment, confessed for the amount of the costs as well as for the original debt, for which he had been arrested by writ out of an inferior court before the 1st of March; the 31th section providing that no person entitled to the benefit of the Act should be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of March. *Billet v. McCarthy*, II. 42 G. 3.
2. A conveyance to a creditor of an insolvent debtor's estate, by the clerk of the peace (in whom it is vested upon the order for the insolvent's discharge by the stat. 41 G. 3, c. 70, s. 15, until the subsequent conveyance to the creditor) does not vest the estate in such creditor, by relation either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace. Therefore such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent debtor, and the order was made to convey the same to the lessor. *Doe d. Widdaby v. Tilling*, E. 42 G. 3.

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Insurance.

See Lex.

1. On an insurance on ship and goods valued at so much, on a voyage to *India* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the first period of the voyage: although a considerable

derable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. *Shaw v. Felton*, M. 42 G. 3.

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2. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk; held, that the assured might recover as for a total loss, though her cargo was saved, and brought to a profitable market. *ib.*
3. A declaration on a policy of insurance on a *foreign* ship need not aver any interest in the assured: though there be no such words as "interest or no interest" in the policy. *Nantes v. Thompson*, E. 42 G. 3. 385
4. A sentence of condemnation by a *French* Court sitting in *Spain*, of a prize taken by a *French* privateer, and carried in there (*Spain* being then a belligerent ally of *France* in the war against *Great Britain*) is valid; and such condemnation, proceeding on the ground of the property being *enemy's and British*, is conclusive in an action on a policy against the underwriter by the assured, who had insured it as *Danish*, which in fact it was, *Denmark* being then *neutral*. *Oddy v. Bovill*, T. 42 G. 3. 473
5. The profits of a cargo employed in trade on the coast of *Africa* are an insurable interest. *Barclay v. Cousins*, T. 42 G. 3. 544
6. So an insurance on *imaginary profit* from *Bordeaux* to *Hamburg* (which was explained to mean the profit which a cargo of indigo, belonging to the assured, would produce on the sale thereof at *Hamburg*, if it arrived safe) was holden good. *Henrichsen v. Margetson*, B. R. Mich. 1776, cited *ib.* 549
7. The rule, by which to calculate a partial loss on a policy on goods by reason of sea damage, is the difference between the respective gross proceeds of the same

goods when sound and when damaged, and not the *net* proceeds; it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination. *Johnson v. Sheddon*, T. 42 G. 3. 581

Issue—Proof of.

Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson v. Hodges*, E. 42 G. 3. 312

Jurisdiction.

See *Excise*.

1. Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for *the said county*, although the proper county were named in the margin, and were also named last before such description of the justices. *R. v. The Inhabitants of Moor Critchell*, M. 42 G. 3. 66
2. By s. 1 of the stat. 39 and 40 G. 3, c. 104, the jurisdiction of the Court of Requests in *London* is enlarged from debts of 40s. to 5*l.* from the 30th *September*, 1800: and by s. 12, if any action *shall be commenced* in any other court to recover any debt not exceeding 5*l.* within the jurisdiction, the plaintiff shall not recover any costs, &c.; held, that the words "*shall be commenced*" must, by necessary construction, be restrained to the date of the 30th *September*, and not to the passing of the Act, which was on the 9th of *July* preceding. *Whitborn v. Evans*, M. 42 G. 3. 135
3. After an appointment of four overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can discharge one of the persons so appointed, though by his desire, and appoint another; but the party must appeal to the Sessions to get his discharge. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 244

4. Semble,

4. Semble, the magistrates making the appointment must be together at the time. *ib.*

Jurors.

A custom to swear the jurors at *one* court leet to inquire, and return their presentments at the *next* court, is bad in law. *Davidson v. Moscrop*, M. 42 G. 3. 56

Landlord and Tenant.

See Covenant, No. 1, 2; or *Rent*.

To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. the defendant, as to the breaking and entering, suffered judgment by default, and pleaded not guilty as to the rest: held that such plea was sustained, by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises, on a foundation of brick, for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired. *Penton v. Robart*, M. 42 G. 3. 88

Lease.

See Forfeiture, No. 1.

Under a power in a will to lease in possession, and not in reversion, a lease for years, executed the 29th *March* to the then tenant in possession, *habendum* as to the arable from the 13th *February* preceding, and as to the pasture, from the 5th *April then next*, &c. under a yearly rent, payable quarterly on 10th *July*, 10th *October*, 10th *January*, and 10th *April*, is void for the whole: though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doe d. Allen v. Calvert*, E. 42 G. 3. 376

Lecturer.

See Mandamus, No. 3.

Libel.

See Slander.

After judgment on the defendant for a libel, the Court refused to make an order on
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the prosecutor to deposit the original libellous papers with the officer of the court. *R. v. Cator*, T. 42 G. 3. 361

Lien.

1. A principal gives notice to his factor of an intended consignment of a ship to him, for the purpose of sale; and in consequence draws bills on him, which the factor accepts; and then the principal dies, and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same; held, that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammond v. Barclay*, H. 42 G. 3. 227
2. The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor, after he had directed his correspondent to make the insurance, takes it, subject to the lien of the correspondent of the consignor, for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. *Mau v. Shaffer*, T. 42 G. 3. 223

Limitation of Action.

Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into port, on suspicion of smuggling, and after process in the Exchequer Court, obtained an order for restitution, which he obtained only paid for by the defendant, the plaintiff was not to maintain trover for the cargo, as the action was barred by the Statute, *from the time of seizure*.

three months from the order for the redelivery. *Saunders v. Saunders*, E. 42 G. 3. 254

Mandamus.

1. Upon an information, in nature of *quo warranto*, against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in, by virtue of a peremptory mandamus from this Court. *R. v. Clarke*, M. 42 G. 3. 75
2. A mandamus to swear one into an office, confers no title in itself to such office. *ib.* and *R. v. The Burgesses of Truro*, 35 G. 3. cited *ib.* 85
3. Where no immemorial custom appeared to appoint a lecturer in a parish church, and, on the contrary, it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar, to the endowment, a mandamus to the bishop to license a lecturer, *without the assent of the vicar*, was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend, payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishops and vicars for the time being. *R. v. The Bishop of Exeter*, T. 42 G. 3. 462

Misdemeanor.

See Indictment, No. 1, 2.

Navy.

See Admiralty.

Non-residence.

See Rector.

Notice to quit.

See Ejectment, No. 1.

Nuisance.

See Action on the Case, No. 5.

A bridge built in a public way without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the *onus* of rebuilding or repairing it immediately on the county. *R. v. The Inhabitants of the West Riding of Yorkshire*, E. 42 G. 3. 342

Ouster—Judgment of.

See Quo Warranto, No. 1.

Overseer of the Poor.

1. An appointment of one overseer alone for a township is bad in law; the stat. 13 and 14 Car. 2, c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 and 9 W. 3, c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the *overseers*, where there are no churchwardens." *R. v. The Inhabitants of Clifton*, H. 42 G. 3. 168
2. After an appointment of four overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the Sessions to get his discharge. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 244
3. And this objection to the second appointment may be disclosed to this Court on affidavit, upon the removal of the appointment hither by *certiorari*; who will thereupon quash the same. *ib.*
4. Semble also, that the magistrates making the appointment must be together at the time the act is done. *ib.*

Payment of Money into Court.

The payment of money into Court upon a count

count stating a special contract, is an admission of such contract, and narrows the inquiry to the *quantum* of damages sustained by the breach thereof. Therefore, if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5*l.* unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *Yate v. Willan*, *M.* 42 *G.* 3. and *Pigott v. Dunn*, *E.* 36 *G.* 3. cited *ib.* 128

Penal Actions.

1. In an action on a penal statute, the declaration must allege the fact to be done *contrà formam statuti* or *statutorum*, as the case may be: stating that by force of the *statute* an action accrued, &c. is not sufficient where the penalty is given by *one* statute, and the right of action to the informer is given by *another*. *Lee v. Clarke*, *E.* 42 *G.* 3. 333
2. Semble, where the record was entitled generally of *Hil.* 41 *G.* 3, and the fact was laid under a *viz.* on the 21st of *January* 1801, whereas the return of the *capias* must have been at least on the 20th *January*, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *ib.* 333
3. Semble, if a statute give an action within six months after the fact committed (by which must be understood *lunar* months) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *ib.* 333
4. Semble, that a declaration for a penalty on killing game brought for the whole penalty on the stat. 2 *G.* 3, c. 19, s. 5, and prior statutes, need not allege the fact to have been committed within two

- terms before the action commenced, according to stat. 26 *G.* 2, the stat. 2 *G.* 3, having allowed six months. *ib.* 333
5. The stat. 37 *G.* 3, c. 90, s. 26, requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it; the sixth section of that Act incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that Act. *Birchard v. Gostling*, *T.* 42 *G.* 3. 379
 6. It seems that two proctors may be sued together for not obtaining and entering their certificates; and that one may be acquitted and the other convicted. *T.* 42 *G.* 3. 379
 7. A joint action may be maintained against several, to recover a penalty upon the game laws. *Hardyman v. Whitker*, *M.* 22 *G.* 3, cited *ib.* 379

Pleading.

See Excise.

1. Upon breach of a contract for the purchase of 100 bags of wheat, forty of any of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff can declare as upon an absolute contract for the delivery of the forty bags on that first day, &c. though forty bags were in fact delivered; but the contract must be stated in the alternative, as stated in the original terms of it. *Perry v. Proctor*, *M.* 42 *G.* 3. 379
2. The same where the contract is to deliver goods within fourteen days, as a certain vessel arrive. See *ib.* 379
3. In an indictment on the stat. 24, for obtaining money by false pretences, it is sufficient to aver that the defendant unlawfully, &c. obtained the designedly pretended sum of money by means of which such sum was obtained, obtaining such pretended sum of money, it be averred that the defendant did so by pretended false and fraudulent means.

- have been sufficient to allege, that he obtained the money by such and such pretences, averring such pretences to be false. *Rex v. Airey*, *M.* 42 *G.* 3. 30
4. In justifying a trespass under the process of a foreign Court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior Courts: but at any rate, a plea which only states that the Court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such Court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said Court, having competent authority in that behalf, to seize the property, is bad, being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the Court, or party to the cause; or of what nature the charge was, or by whom instituted; or what the order of seizure was, whether absolute or *quousque*, &c. *Collett v. Lord Keith*, *E.* 42 *G.* 3. 260
5. In an action on a penal statute the declaration must allege the fact to be done *contra formam statuti*, or *statutorum*, as the case may be: stating that *by force of the statute* an action accrued, &c. is not sufficient, where the penalty is given by *one* statute, and the right of action to the informer is given by *another*. *Lee v. Clarke*, *E.* 42 *G.* 3. 333
6. Semble, where the record was entitled generally of *Hil.* 41 *G.* 3. and the fact was laid under a *viz.* on 21st *January* 1801, whereas the return of the capias must have been at latest on 20th *January*, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *Ib.* 333
7. Semble, if a statute give an action within six months after the fact committed, (by which must be understood *lunar* months) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *Ib.* 333
8. Semble, that a declaration for a penalty on killing game brought for the whole penalty on the stat. 2 *G.* 3, c. 19, s. 5, and prior statutes, need not allege the fact to have been committed within two terms before the action commenced, according to stat. 26 *G.* 2, c. 2, the stat. 2 *G.* 3, having allowed six months. *Ib.* 333
9. 1. The stat. 26 *G.* 3, c. 77, s. 13, which enacts that no person shall prosecute "any action, bill, plaint, or information, "in any of the king's courts," for the recovery of any excise penalty, &c. unless prosecuted by the Attorney-General or some revenue officer, is confined to the superior courts of record: and therefore an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10. of the same statute) may be prosecuted before the commissioners of excise by one not averred to be such officer.—2. And the information, stating in effect that the candles were home-made candles, seems to be sufficient, without expressly naming them *British* candles; the words of the Act being "*British* spirits, soap, and candles:" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy.—3. The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condemnation as well as the prior payment of the duty before removal; though that seems proper enough.—4. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy.

- conspiracy.—5. Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 *G. 2*, stat. 2, c. 16.—6. Neither is it necessary in reciting such prior information, averred to have been made within three months after the offence committed, according to stat. 1 *W. & M.* c. 54, s. 13, also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute.—7. Where the stat. 7 and 8 *W. 3*, c. 30, s. 24, enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made, proof of a printed summons distributed and issued in blank, by order of the commissioners to their agents, and afterwards filled up by one of them without any special directions from the board, is sufficient, although not signed by any of the commissioners, nor issued in their individual names: such having been the constant usage in that respect since the introduction of the excise. *R. v. Stevenson*, *E. 42 G. 3.* 362
10. A declaration on a policy of insurance on a *foreign* ship need not aver any interest in the assured; though there be no such words as “interest or no interest” in the policy. *Nantes v. Thompson*, *E. 42 G. 3.* 385
11. In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the Court. *Dimsdale v. Nielson*, *E. 42 G. 3.* 406
12. In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words, or *to that effect*; although in the libel declared on the defendant stated that another had spoken the same slanderous words of the plaintiff, or *words to that effect*; but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Mutbuel v. Goldney*, *T. 42 G. 3.* 426
13. *Qu.* Whether the defendant can by naming the original author justify the publishing in writing slanderous words spoken by such other, especially after knowing that they were unfounded? *ib.*
14. In an action on the case in tort for a breach of warranty of goods, the *scouter* need not be charged, nor if charged, need it be proved. *Williamson v. Allen*, *T. 42 G. 3.* 446
15. It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie be laid in the declaration as a venue or as local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *Company of Proprietors of the Mersey and Irwell Navigation v. Douglas*, *T. 42 G. 3.* 497
16. If in an action on the case for a nuisance in erecting a weir, it be described in the declaration to be at *H.* and be proved to be at a lower part of the same water called *T.* the variance is fatal. *Slaney, Wingley*, *York sum. ass. 17 01.* cor. *Wylson, J.* cited *ib.* 500
17. The stat. 17 *G. 3*, c. 90, s. 6, requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it; the sixth section of that act incorporating the powers of s. 12, w. given by former statutes, only referring to penalties in respect of duties on duty prior sections of that Act. *Barnard v. Gosling*, *T. 42 G. 3.* 504
18. It seems that two proctors may be sued together for not obtaining, and entering their certificates; and that one may be acquitted and the other convicted. 12 A

19. A joint action may be maintained against several to recover a penalty upon the game laws. *Hardyman v. Whitaker, M.* 22 G. 3. cited *ib.* 573

Poor.

See *Assumpsit*, No. 6. *Overseers of the Poor, Removal, Order of.*

Poor Rate.

A *Slate-work* (or, as improperly called, a slate mine) is rateable to the poor. *R. v. The Inhabitants of Woodland, H.* 42 G. 3. 164

Poor—Rate in Aid.

An order for taxing one parish in aid of another, under the stat. 43 *Eliz. c. 2, s. 3*, held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution between each other, under special officers, who were empowered to purchase land for the erection of poor-houses and for a burial-ground; there being a proviso in the Act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace “to tax *parishes* in aid of others by virtue of the statute 43 *Eliz.* as fully as if this Act had not been made.” *R. v. The Inhabitants of St. Helen, Worcester, T.* 42 G. 3. 417

Power.

Under a power in a will to lease *in possession* and *not in reversion*, a lease for years executed the 29th of *March* to the then tenant in possession habendum as to the arable from the 13th of *Feb.* preceding; and as to the pasture, from the 5th of *April then next*, &c. under a yearly rent payable quarterly, on the 10th *July*, 10th of *October*, 10th of *January*, and 10th of *April*, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doc d. Allan v. Culvert, E.* 42 G. 3. 376

Practice.

1. No judgment shall be entered up under a warrant of attorney to confess judgment, without such warrant being delivered to and filed by the clerk of the dockets. *Reg. Gen. M.* 42 G. 3. 136
2. Every attorney of *B. R.* who shall prepare any such warrant of attorney, which is to be subject to any defeazance, shall cause such defeazance, or a memorandum in writing of the substance and effect thereof, to be written on the same. *ib.*
3. If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity. *R. v. The Sheriff of Surrey, H.* 42 G. 3. 181
4. A defendant in a crown prosecution cannot carry down the *nisi prius* record to trial by proviso. *R. v. Macleod, H.* 4 G. 3. 202
5. If an order of removal be confirmed at the Sessions, and both orders be afterwards removed into *B. R.* by *certiorari* on a case reserved, and *B. R.* disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; *B. R.* will quash both the orders, without remitting the matter back to the Sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1, c. 7, s. 9. And at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell, H.* 42 G. 3. 222
6. All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered. *Harrison v. Franco, H.* 42 G. 3. 225
7. The Court will not quash a defective indictment on the motion of the prosecutor after plea pleaded, before another good indictment be found. *R. v. Dr. Wynn, H.* 42 G. 3. 226
8. A rule to bring in the body, tested on the day of the return by the sheriff of *capit corpus*.

corpus, though issued afterwards in the vacation, is irregular. *Rex v. The Sheriff of London*, II. 42 G. 3. 241

9. A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. *Blackburn v. Stupart*, H. 42 G. 3. 243
10. An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon. *Davison v. Frost*, E. 42 G. 3. 305
11. An objection to a second appointment of overseers of the poor for want of jurisdiction in the magistrates, may be disclosed to B. R. on affidavit, upon the removal of the appointment thither by *certiorari*. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 244
12. Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the controul or influence of the defendant. *R. v. Pinkerton*, E. 42 G. 3. 357
13. After judgment on the defendant for a libel, the Court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the Court. *R. v. Cator*, E. 42 G. 3. 351
14. In a county cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the Court. *Dimsdale v. Nielson*, E. 42 G. 3. 406
15. The Court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no

Principal and Factor.

A principal gave notice to his factor of an intended consignment of a ship to him, for the purpose of sale; and in consequence drew bills on him, which the factor accepted; and then the principal died; and his executors directed the captain of the ship to follow his former orders; and thereupon delivered the ship into the possession of the factor, who sold the same; held, that the factor has a lien upon the proceeds, as well for the recovery of money disbursed by him for the necessary use of the ship, as for the freight for the acceptance, so long as the bills are not paid for the amount of this last-mentioned acceptance; not then only. *H. v. Bardon*, *H. 42 Gr.*

Prize.

- [illegible]

- conclusive in an action on a policy against the underwriter by the assured, who had insured it as *Danish*, which in fact it was, *Denmark* being then neutral. *Oddy v. Bovill*, T. 42 G. 3. 473
2. An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a King's ship is valid, by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship, and notice is only taken of one captain in the book of regulations for the navy. And such second captain is entitled to a captain's share of prize under the King's proclamation. *Waterhouse v. King*, T. 42 G. 3. 507
2. Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the Court will grant an information in nature of a *quo warranto*; though the fact of the defendant's usurpation no otherwise appeared than by the deponents' swearing to their *information and belief* that the defendant was admitted a freeman, and sworn and inrolled accordingly; the defendant not denying the fact when called upon by a rule to shew cause. *R. v. Harwood*, H. 42 G. 3. 177
3. Information in nature of *quo warranto* lies for the office of bailiff of a court-leet, being a prescriptive officer, having power to summon and select the jury. *R. v. Bingham*, E. 42 G. 3. 308

Proctors.

See Penal Action, No. 5, 6.

Prohibition.

See Will, No. 1, 2.

Promotions, &c.

See Page, 253, 4.

Quo Warranto.

Information in Nature of.

See Corporation.

1. Upon an information in nature of *quo warranto* against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory *mandamus* from this Court. But, semble, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment of *ouster quousque*, &c. *R. v. Clarke*, M. 42 G. 3. 75

Rate—Poor.

See Poor Rate.

Regulæ Generales.

See P. 136, 307.

Rector.

- A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by the force of the stat. 13 Eliz. c. 20. And the lease to the defendant, describing him as doctor in divinity, produced by him at the trial in support of his title, is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 H. 8. c. 13, s. 3. *Frogmorton d. Fleming v. Scott*, T. 42 G. 3. 467

Registry.

See Ship.

Removal—Order of.

1. Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for *the said county*, although the

INDEX.

the proper county were named in the margin, and were also named last before such description of the justices. *R. v. The Inhabitants of Moor Critchell*, *M.* 42 *G.* 3. 66

2. If an order of removal be confirmed at the Sessions, and both orders be afterwards removed into *B. R.* by *certiorari* on a case reserved, and this Court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order, this Court will quash both the orders, without remitting the matter back to the Sessions to quash the original order for the purpose of enabling them to give maintenance according to stat. 9. *G.* 1, c. 7, s. 9, and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell*, *H.* 42 *G.* 3. 222

Requests—Court of.

See Jurisdiction, No. 2.

Revenue Officers.

Where the commander of one of the king's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling; and after process in the Exchequer, the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant; the owner cannot maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. *Saunders v. Saunders*, *E.* 42 *G.* 3. 254

Rent.

An action of covenant lies against the assignee of a lessee of an estate for a part of the rent; as in such case the action is brought on a real contract in respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or re-

plevin. Aliter in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard*, *T.* 42 *G.* 3. 575

Sessions.

See Overseers of the Poor, No. 2.

To solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the *soliciting and inciting*.—And such offence is indictable at the Sessions, having a tendency to a breach of the peace. *R. v. Higgins*, *M.* 42 *G.* 3. 5

Sessions—Orders.

See Practice, No. 5, or *Removal, Orders of*, No. 2.

Settlement.

See Evidence, No. 3.

— by *Apprenticeship*.

See Settlement by Hiring and Service, No. 1.

Settlement under Certificate.

1. An appointment of one overseer alone for a township is bad in law; the stat. 13 & 14 *Car.* 2, c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the statutes and 9 *H.* 3, c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the churchwardens, where there are no overseers." *R. v. The Inhabitants of Clifton*, *H.* 42 *G.* 3. 185
2. A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her estate, though the son were of age, and earned

on business for himself; such circumstances not amounting to an emancipation. *R. v. The Inhabitants of Sowerby*, *E. 42 G. 3.* 276

——— *Evidence.*

1. Where a case from the sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there; since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. *R. v. The Inhabitants of Chaderton*, *M. 42 G. 3.* 27
2. Hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information respecting her own settlement were dead. *ib.*
3. Neither the hearsay of a pauper who is dead, nor his *ex parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. *R. v. The Inhabitants of Ferry Frystone*, *M. 42 G. 3.* 54
4. An *ex parte* examination in writing of a pauper, touching his settlement, cannot be received in evidence of such settlement, though he be dead. *R. v. The Inhabitants of Abergwilly*, *M. 42 G. 3.* 63

——— *by Hiring and Service.*

1. Where a pauper agreed with a weaver to serve him for a year and a half, and the master was to *teach him to weave*, and the pauper was to have half his earnings, and find himself in every thing, under which contract the pauper served his master for above a year; held, that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and *servant*, and not that of master and *apprentice*. *R. v. The Inhabitants of Eccleston*, *E. 42 G. 2.* 298
2. A servant hired for a year departed from his master some short time before the end

of the year, on ill usage, but received his whole year's wages, and something over: held, that he thereby gained no settlement, he having refused to serve out the year when required by his master. *R. v. The Inhabitants of Corsham*, *E. 42 G. 3.* 303

3. A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring; tho' the servant continued six years with the master, and the wages were raised during the period: and therefore no settlement can be gained under such hiring and service. *R. v. The Inhabitants of Hanbury*, *T. 42 G. 3.* 423

——— *by Office.*

- A curate officiating in a parish for above a year, under the bishop's licence to perform the *office* of curate, at a certain annual stipend, is yet not such an annual *officer* as is entitled to gain a settlement by virtue of the stat. 3 W. 3, c. 11, s. 6. *R. v. The Inhabitants of Wantage*, *M. 42 G. 3.* 65

——— *from the parents.*

- A person cannot gain a settlement by hiring and service with the son of a certificated man, continuing to reside in the certificated parish with the mother after his father's death, as part of her family, though the son were of age and carrying on business for himself; such circumstances not amounting to an emancipation. *R. v. The Inhabitants of Sowerby*, *E. 42 G. 3.* 276

——— *by Rating.*

1. A settlement, by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate. *R. v. The Inhabitants of Coppull*, *M. 42 G. 3.* 25
2. An exciseman who was rated for his salary, which was in fact paid by the collector,

collector, without any deduction from the salary, does not thereby gain a settlement. *R. v. The Inhabitants of Weobly, M.* 42 G. 3. 68

Settlement by taking a Tenement.

1. A contract for a *standing place in another's mill* for a carding machine (the party's own property) which was fastened to the floor and the roof, for the purpose of being worked by the steam-engine of the mill; for which the party was to give 20*l.* a year, with liberty to quit on giving three months' notice, is not a taking of a tenement, but a mere license to use the machinery of the mill; and therefore no settlement can be derived under it. *R. v. The Inhabitants of Mellor, H.* 42 G. 3. 189
2. Renting a dairy (including the cows and their pasture) at above 10*l.* a year in value, will not confer a settlement, if the annual value of the *lands* on which the cows were to be depastured were under 10*l.* *R. v. The Inhabitants of Minworth, H.* 42 G. 3. 198

Sheriff's Poundage.

The Court directed the sheriff to refund his poundage, which he had retained out of money levied upon an attachment for non-payment of money: there being no practice to warrant it; and referred him to his action, if he were supposed to have a right to it under the stat. 23 *H.* 6, c. 9. *R. v. Palmer, T.* 42 G. 3. 411

Ship.

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the Registry Acts of the 26 G. 3, c. 60, and 34 G. 3, c. 68, s. 16.; though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass; but the assignees of the bankrupt may recover the possession of such

ship in trover. *Moss v. Charnock, E.* 42 G. 3. 399

Slander.

1. In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words, *or to that effect*; although in the libel declared on, the defendant stated that another had spoken the same slanderous words of the plaintiff, *or words to that effect*; but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Maitland v. Goldney, T.* 42 G. 3. 426
2. *Qu.* Whether a defendant can, by naming the original author, justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded. 426

Stamps.

The proper stamp for a promissory note of 45*l.* is 1*s.* 6*d.* composed of three different sums, applicable to different funds under three Acts of Parliament. But such a note on a 2*s.* stamp, composed of three different sums applicable to the same funds, though in larger proportion to each than was required, was holden valid. *Taylor v. Hopes, T.* 42 G. 3. 414

Statute.

By s. 1 of stat. 59 and 60 G. 3, c. 14, the jurisdiction of the Court of Requests in *London* is enlarged from 40*l.* to 50*l.* from the 30th September, 1818, and by s. 12, if any action shall be commenced in any other court to recover any debt not exceeding 50*l.* within the jurisdiction, the plaintiff shall not recover any costs, &c.; hold, that the words "*shall be commenced*" must, by necessary construction, be construed to the date of the 30th September, and not to the passing of the Act, which was on the 9th of July preceding. *Widdowson v. Evans, M.* 42 G. 3. 427

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39 & 40, c. 104. (Court of Requests)	135
41. c. 10. (Stamps)	415
41. c. 70. (Insolvent debtor)	148

Stock.

In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time, while the market was rising. *Shepherd v. Johnson*, *H. 42 G. 3.* 211

Supersedeas.

A writ of error allowed, though not returned, is in itself a *supersedeas*; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against

against them in *scire facias* upon the recognizance of bail prosecuted after a return by the sheriff of *non est inventus*, made pending such writ of error. *Sampson v. Brown*, T. 42 G. 3. 439

Tenant.

See Landlord.

Trespass.

See Landlord and Tenant, No. 1.

Pleading, No. 4.

To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c.—The defendant, as to the breaking and entering, suffered judgment by default, and pleaded not guilty as to the rest. Held, that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick, for the purpose of carrying on his trade; and that he still continued in possession of the premises at the time when, &c. though the term was then expired. *Penton v. Robart*, M. 42 G. 3. 88

Trial—by Proviso.

1. A defendant in a crown prosecution cannot carry down the *nisi prius* record to trial by proviso. *R. v. Macleod*, H. 42 G. 3. 202
2. General note on the trial by proviso, and *quere* as to prosecutions by private persons. *Ib.* 206

Trover.

Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into the next port, on suspicion of smuggling; and after process in the Exchequer, the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant, the owner cannot maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for

the re-delivery. *Saunders v. Saunders*, E. 42 G. 3. 254

Variance.

See Evidence, No. 4.

Pleading, No. 1, 2, 9, 15.

Warranty.

1. Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given. And therefore, if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased) such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*, E. 42 G. 3. 314
2. In an action on the case in tort for a breach of a warranty of goods sold, the *scintilla* need not be charged, nor, if charged, need it be proved. *Williamson v. Allison*, T. 42 G. 3. 446

Warrant of Attorney to confess Judgment.

See Practice, No. 1, 2.

Will.

See Devise.

1. Prohibition lies to the spiritual Court if a suit be instituted to obtain a *grant* of probate of the will of a woman, made during her coverture, though *with* her husband's consent, and though she *survived* him; for he could not, by any assent of his, enable her to dispose of any will made during the coverture of property which she might acquire after his death, but only of property over which he himself had a disposing power. *St. John v. Wilkinson*, T. 42 G. 3. 222
2. But a feme covert may make a will disposing of property which she only has in *autre droit*, as execution, &c. &c. without her husband's consent.

Revocation.

1. One devised his personal estate to *A.*, and his real estate to *B.*; and after *A.*'s death, the deviser having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testamentary estate to *C.*; and then added, "*As to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made by this my will.*" This is no revocation of the first will, whether considering that he meant to include the same property therein devised; because it is a mere declaration of an intent to dispose of it in future, and *non constat* that such disposition would be inconsistent with the first will: nor is it any revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of *A.* *Thomas d. Jones, and others, v. Evans, T. 42 G. 3.* 488
2. *A.* by will provided an annuity for *B.* with whom he cohabited; and directed his trustee and executor out of his real estate, *in case he should have any child or children by B.* to raise 3000*l.* to be paid to and amongst *his said children*, and devised the remainder of his estate over to several of his relatives. Afterwards he married *B.*, and had several children by her. Held, that such subsequent marriage and births did not revoke his will; the objects having been

therein contemplated and provided for. *Kenebel v. Scrafton, T. 42 G. 3.* 530

3. *Qu.* Whether such implied revocations may be rebutted by evidence of parol declarations of the testator, made after the events, that he meant his will to stand. *ib.*

Witness.

1. An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorser, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment, makes no difference. *Birt v. Kershaw, T. 42 G. 3.* 458
2. A parishioner having made rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes, is a competent witness for the parish in which he is so liable to be rated. *R. v. The Inhabitants of Kirdford, T. 42 G. 3.* 559
3. So such an one is a good witness to extend the boundaries of his parish on a question of boundary between two adjoining parishes. *Deacon v. Cook, Taunton Sp. Ass. 1789, cited ib.* 562
4. Aliter if he were actually rated at the time. *ib.*



